IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO

ANNOTATED

ORIGINALLY PUBLISHED BY AUTHORITY OF
LAWS 1947, CHAPTER 224

REPUBLISHED BY AUTHORITY OF
LAWS 1949, CHAPTER 167 AS AMENDED

Compiled Under the Supervision of the
Idaho Code Commission

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COMMISSIONERS

TITLES 29-30

MICHIE

4626510

ISBN 978-0-7698-6249-1

(Pub.42205)

PUBLISHER'S NOTE

Since the 2005 publication of the bound volume containing Titles 29 and 30 of the Idaho Code, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for the former volume has made it necessary to revise that volume. Accordingly, this new volume with Replacement Titles 29 and 30 is issued with the approval and under the direction of the Idaho Code Commission.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals and the appropriate federal courts. These cases will be printed in the following reports:

Idaho Reports
Pacific Reporter
Federal Supplement
Federal Reporter
United States Supreme Court Reports, Lawyers' Edition

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law.

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

Year	Adjournment Date
1921	March 5, 1921
1923	March 9, 1923
1925	March 5, 1925
1927	March 3, 1927
1929	March 7, 1929
1931	March 5, 1931
1931 (E.S.)	March 13, 1931
1933	March 1, 1933
1933 (E.S.)	June 22, 1933
1935	March 8, 1935
1935 (1st E.S.)	March 20, 1935
1935 (2nd E.S.)	July 10, 1935
1935 (3rd E.S.)	July 31, 1936
1937	March 6, 1937
1937 (E.S.)	November 30, 1938
1939	March 2, 1939
1941	March 8, 1941
1943	February 28, 1943
1944 (1st E.S.)	March 1, 1944
1944 (2nd E.S.)	March 4, 1944
1945	March 9, 1945
1946 (1st E.S.)	March 7, 1946
1947	March 7, 1947
1949	March 4, 1949
1950 (E.S.)	February 25, 1950
1951	March 12, 1951
1952 (E.S.)	January 16, 1952

1953	March 6, 1953
1955	March 5, 1955
1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971
1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997

1998	March 23, 1998
1999	March 19, 1999
2000	April 5, 2000
2001	March 30, 2001
2002	March 15, 2002
2003	May 3, 2003
2004	March 20, 2004
2005	April 6, 2005
2006	April 11, 2006
2006 (E.S)	August 25, 2006
2007	March 30, 2007
2008	April 2, 2008
2009	May 8, 2009
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2012	March 29, 2012
2013	April 4, 2013

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CONTRACTS

CHAPTER 1

GENERAL PROVISIONS RELATING TO CONTRACTS

29-101. Who may contract. — All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

History.

1863, p. 515, § 1; R.S., § 3220; reen. R.C. & C.L., § 3312; C.S., § 5661; I.C.A., § 28-101.

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Disaffirmance of contract by minor, § 32-103.

Goods over $500, written contracts, § 28-2-201.

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Estoppel.

Parties having reached agreement and entered into a contract set forth and sued upon, are estopped to deny its general nature and force and effect and must act in accordance with such agreement and understanding. Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948).

Married Women.

Married woman is not "deprived of her civil liberty" within meaning of this section, so as to render her incapable of contracting. Bassett v. Beam, 4 Idaho 106, 36 P. 501 (1894).

This section does not confer upon married women right to make any and all contracts that may be made by a feme sole. Dernham v. Rowley, 4 Idaho 753, 44 P. 643 (1896).

Section 32-904 gives married women the same contractual rights and responsibilities with respect to their separate property as those enjoyed by married men. Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1976).

Restrictive Agreements.

Restrictive agreements as to the use of property are legal. Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948).

Cited in: Beard v. Beard, 53 Idaho 440, 24 P.2d 47 (1933); State v. Bronson, 94 Idaho 306, 486 P.2d 1019 (1971).

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A.L.R. — Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods. 12 A.L.R.3d 1174.

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29-102. Enforcement by beneficiary. — A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

History.

R.S., § 3221; reen. R.C. & C.L., § 3313; C.S., § 5662; I.C.A., § 28-102.

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Agreement to Pay Debts.

Where the purchaser of a poultry business agreed to pay the business's debts, including a debt to a poultry supplier, and that agreement was supported by adequate consideration and not rescinded, the supplier was a third-party beneficiary of the contract and was entitled to assert and have judgment in its favor by way of setoff against a debt owed by the supplier to the purchaser. Treasure Valley Foods, Inc. v. J-M Poultry Packing Co., 98 Idaho 366, 564 P.2d 978 (1977).

Where buyer agreed in a lease contract, executed with the purchase of the seller's land, to pay the seller's arrearage with a power company, the power company could not enforce that lease provision against the buyer because the lease was executed only to provide cash flow to the buyer and to the seller to continue to operate a business on the land; hence, the company was not an intended beneficiary of the lease contract. Idaho Power Co. v. Hulet, 140 Idaho 110, 90 P.3d 335 (2004).

Beneficiaries.

A contract between the lessee-grower and crop purchaser, which enumerated the rights and duties of those parties toward each other, was not drawn expressly for the benefit of the farmowner lessor; thus, the farmowner was

not entitled to demand performance from the crop purchaser. Wing v. Amalgamated Sugar Co., 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, NBC Leasing Co. v. R & T Farms, Inc., 112 Idaho 500, 733 P.2d 721 (1987).

Before recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit or, as sometimes stated, primarily for his benefit; it is not sufficient that he be a mere incidental beneficiary. Adkison Corp. v. American Bldg. Co., 107 Idaho 406, 690 P.2d 341 (1984).

Where a contract was not made expressly for the benefit of any of the plaintiffs as third parties to the arrangement between the contracting parties, and where it referenced Utah law in a generalized statement that the rights and obligations of the parties should be governed in accordance with the laws of Utah, this did not suffice to invoke the terms of this section, and the district court's decision that the plaintiffs, who did not have valid liens, could recover under the Utah bond statutes as an alternative theory was vacated. Great Plains Equip., Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999).

Where the owners entered into a contract with the general contractor for the design of a cabin and the supply of construction materials, the owners were not permitted to directly sue a subcontractor for breach of contract as a third party beneficiary where the benefits the owners received from the subcontractor's performance were merely incidental. Nelson v. Anderson Lumber Co., 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Client, the promisor, directed his promise to pay to the company, making the company the named promisee of the note, and as such, the company did not have an enforceable right against the client as a third party beneficiary but, rather, had an enforceable right as the promisee of the note so long as the note was otherwise enforceable; thus, the district court's holding that the company may enforce the note as a third party beneficiary was made in error. Sirius LC v. Erickson, 144 Idaho 38, 156 P.3d 539 (2007).

Comparison.

California and Oklahoma have statutes providing that third party beneficiaries may sue to enforce nonrescinded contracts. See Cal. Civ. Code, § 1559 and Okla. Stat., tit. 15, § 29. These statutes have been interpreted to leave untouched the doctrine that after acceptance or reliance, a third party beneficiary contract cannot be unilaterally rescinded. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

Federal Rule.

The federal court decisions permit a third person, not a party to a contract, to enforce the promissory obligation only where he is the beneficiary solely interested in the promise. Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2, 59 F.2d 19 (9th Cir.), cert. denied, 287 U.S. 638, 53 S. Ct. 87, 77 L. Ed. 552 (1932).

Intent to Benefit.

The contract itself must express an intent to benefit the third party; this intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered. Adkison Corp. v. American Bldg. Co., 107 Idaho 406, 690 P.2d 341 (1984).

Under Idaho law, if a party can demonstrate that a contract was made expressly for his benefit, he may enforce that contract, at any time prior to rescission, as a third party beneficiary. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

There was no evidence in the record showing that hauler and farmer intended to benefit dairyman when they entered into an agreement regarding the hauler handling hay produced by the farmer. At most, dairyman was only an "incidental beneficiary" within hauler's contemplation when the agreement was made. Hilt v. Draper, 122 Idaho 612, 836 P.2d 558 (Ct. App. 1992).

If a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, prior to recision, as a third-party beneficiary; the test for determining a party's status as a third-party beneficiary, capable of properly invoking the protection of this section, is whether the agreement reflects an intent to benefit the third party. Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 744, 874 P.2d 555 (Ct. App. 1993), rev'd in part, 125 Idaho 409, 871 P.2d 826 (1994).

Leases.

Fact that lease was to expire in two years if plaintiff failed to sublease to defendants, shows that extension agreement between landlord and plaintiff for five years was made expressly for defendant's benefit and sustains defendant's claim of third party beneficiary of the extension agreement. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1949).

Public Contracts.

Absent a manifest intent to the contrary, construction contracts between a contractor and a state or other public body for highway repair or construction of a new highway are generally not considered as being for the benefit of third persons, but are, on the one hand, for the benefit of the state in the performance of its duties to maintain highways on behalf of the public and, on the other hand, for the benefit of the contractor by way of compensation to be paid. Davis v. Nelson-

Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967).

Provisions of contract between local improvement district and construction company, whereby construction company agreed to provide continuous ingress and egress to and from all businesses that might be affected by the work and to protect such businesses from damages, obligated the construction company to take certain precautionary measures for the benefit of a limited, defined class of third parties, the businesses within the local improvement district; thus, members of that class of third-party beneficiaries were entitled to sue for the construction company's alleged breach of those contract provisions. Just's, Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978).

Rescission.

After a contract for the benefit of a third person has been accepted or acted upon by that person, it cannot be rescinded without his consent. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

Violation of Contract With City.

It was error to summarily dismiss a count of a complaint against a construction company by one injured by his truck striking an outcropping of rock adjacent to a street area where defendant was installing sewer pipe under contract with the city, which injury was alleged to have been caused by defendant's violation of a provision of his contract requiring installation of warning devices and of which contract plaintiff claimed to be a third party beneficiary. Stewart v. Arrington Constr. Co., 92 Idaho 526, 446 P.2d 895 (1968).

Subscriber to cable TV was found to be a third party beneficiary of franchise contract between city and cable service with the right to sue for rate overcharge. Bush v. Upper Valley Telecable Co., 96 Idaho 83, 524 P.2d 1055 (1974).

Cited in: Sauve v. Title Guar. & Sur. Co., 29 Idaho 146, 158 P. 112 (1916); Dawson v. Eldridge, 84 Idaho 331, 372 P.2d 414 (1962).

29-103. Presumption of consideration. — A written instrument is presumptive evidence of a consideration.

History.

R.S., § 3222; reen. R.C. & C.L., § 3314; C.S., § 5663; I.C.A., § 28-103.

STATUTORY NOTES

Cross References.

Consideration in negotiable instruments, § 28-3-303.

JUDICIAL DECISIONS

Analysis

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Acknowledgment of Services.

The written acknowledgment of broker's services and promise to pay therefor, being unrelated to the oral promise to pay for such services when yet to be performed, was sufficient to satisfy the requirements of the statute of frauds or § 9-508, such written instrument being presumptive evidence of a valid consideration and the burden would rest on appellants to avoid such instrument. Homefinders v. Lawrence, 80 Idaho 543, 335 P.2d 893 (1959).

Attorney's Agreement to Compensate for Improper Advice.

Where attorney, by written agreement, promised client, who was his sister, that he would compensate her for any loss she may

suffer as a result of taking his advice in failing to waive community property rights in order to take specific bequests under will, an agreement of forbearance to sue would be presumed as consideration for the agreement. Frasier v. Carter, 92 Idaho 79, 437 P.2d 32 (1968).

Consideration.

Where one under influence of threats or persuasion, and for purpose of avoiding a present or threatened embarrassment agrees to pay or recognize a claim that has no foundation either in equity or law, such agreement is without consideration and void. Vane v. Towle, 5 Idaho 471, 50 P. 1004 (1897); Blaine County Nat'l Bank v. Timmerman, 42 Idaho 338, 245 P. 389 (1926).

Where contract is introduced in evidence and no proof offered of failure of consideration, court's conclusion must rest upon construction of contract itself. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Benefit to third person is sufficient consideration for promise. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Where promise is made for benefit of several persons, it is not essential to recovery thereon that each of such persons should have contributed to consideration. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Defense of failure of consideration must be established by fair preponderance of evidence. First Nat'l Bank v. Doschades, 47 Idaho 661, 279 P. 416 (1929).

A proposed amendment by defendants in action brought for a declaratory judgment under a contract which alleged want of consideration, but which did not set up facts, which, if proven, would constitute want of consideration, was defective, since a written instrument is presumptive evidence of consideration. Merritt v. Sims, 78 Idaho 292, 301 P.2d 1108 (1956).

A written instrument is presumptive evidence of consideration, but that presumption is rebuttable and not conclusive, and a party seeking to avoid or invalidate the contract may introduce evidence of a lack of consideration. Lewis v. Fletcher, 101 Idaho 530, 617 P.2d 834 (1980).

Court's decision that option contract that provided for consideration of $1 and other good and valuable consideration was supported by valid consideration was based on substantial and competent evidence where the record demonstrated that 10 years after the fact no one involved had a clear memory of everything that transpired in completing the transaction and the instrument itself provided for "other good and valuable consideration" and there was a written acknowledge of the receipt of such consideration. Dennett v. Kuenzli, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

In a dispute involving restrictive covenants, an owner failed to meet his burden of showing that new members did not give consideration when joining the estate and signing an amended covenant; by signing the document, the new members agreed to be bound by all of the terms contained therein. Best Hill Coalition v. HALKO, LLC, 144 Idaho 813, 172 P.3d 1088 (2007).

Guaranty Contracts.

Contract of guaranty in writing imports a consideration. Allis-Chalmers Mfg. Co. v. Citizens' Bank & Trust Co., 3 F.2d 316 (D. Idaho 1924).

Indorsements.

Where indorsement of notes after delivery is in writing, presumption of consideration obtains. Thomas v. Hoebel, 46 Idaho 744, 271 P. 931 (1928).

Mutual Promises.

A mutual contributing or indemnity contract is supported by mutual promises of the signers to each other and payment under it. Caldwell v. McKenna, 54 Idaho 552, 33 P.2d 366 (1934).

Presumption.

Where no consideration is mentioned in document, party is not estopped from showing no consideration in fact. Porter v. Title Guar. & Sur. Co., 17 Idaho 364, 106 P. 299 (1909).

This section and § 29-104 merely provide that a written instrument imports a consideration and that the burden of proving want of consideration lies on the party seeking to avoid it; they do not go to the extent of presuming the source of such consideration. Aker v. Aker, 52 Idaho 713, 20 P.2d 796, cert. denied, 290 U.S. 587, 54 S. Ct. 80, 78 L. Ed. 518 (1933).

Separate Contract of Married Woman.

This presumption is insufficient to obviate necessity of showing, where person sought to be held on a promissory note is a married woman, that debt was contracted for her own use or benefit, or use or benefit of her separate estate. McFarland v. Johnson, 22 Idaho 694, 127 P. 911 (1912).

Specific Performance.

In an action for specific performance the duty of alleging, and the burden of proving inadequacy of consideration, rests on the party relying on it as a defense. Locklear v. Tucker, 69 Idaho 84, 203 P.2d 380 (1949).

Specific performance will not be granted unless the contract is complete, definite and certain in all its material terms, or contains

provisions which are capable in themselves of being reduced to certainty. Locklear v. Tucker, 69 Idaho 84, 203 P.2d 380 (1949).

Cited in: Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549 (1930); Aker v. Aker, 52 Idaho 713, 20 P.2d 796 (1933); Caldwell v. McKenna, 54 Idaho 552, 33 P.2d 366 (1934); Robertson v. Hansen, 89 Idaho 107, 403 P.2d 585 (1965); Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967); W.L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982); McCandless v. Carpenter, 123 Idaho 386, 848 P.2d 444 (Ct. App. 1993).

29-104. Want of consideration — Burden of proof. — The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

History.
R.S., § 3223; reen. R.C. & C.L., § 3315; C.S., § 5664; I.C.A., § 28-104.

JUDICIAL DECISIONS

Analysis

Affirmative defense.
Agreement to pay client for loss.
Burden not met.
Issue not pleaded.
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Affirmative Defense.
Under certain conditions parol evidence may be introduced to show the true consideration or want of consideration for a promissory note or other instrument; however, the supreme court has consistently held that the defense of want or failure of consideration are affirmative defenses to be pleaded. Rosenberry v. Clark, 85 Idaho 317, 379 P.2d 638 (1963).

Agreement to Pay Client for Loss.
In an action on an attorney's written agreement to compensate a client for any loss sustained by his neglect to advise her to execute a waiver required to qualify for specific bequests under her late husband's will, the burden was upon the personal representative of such attorney to establish any claimed want of consideration. Frasier v. Carter, 92 Idaho 79, 437 P.2d 32 (1968).

Burden Not Met.
In a dispute involving restrictive covenants, an owner failed to meet his burden of showing that new members did not give consideration when joining the estate and signing an amended covenant; by signing the document, the new members agreed to be bound by all of the terms contained therein. Best Hill Coalition v. HALKO, LLC, 144 Idaho 813, 172 P.3d 1088 (2007).

Issue Not Pleaded.
Contention of appellants that trial court committed error in sustaining respondent's objection to a question propounded to appellant whereby the witness was asked to explain what consideration was paid him by the corporation for the execution of the note and mortgage involved in this suit, such objection, being that an attempt was being made to alter a written instrument by parol evidence, was not sustained, in view of the fact that there was no issue under the pleadings regarding the consideration of either instrument nor anything pleaded by either party claiming want or failure of consideration or fraud on the part of any party. Rosenberry v. Clark, 85 Idaho 317, 379 P.2d 638 (1963).

Rebuttable Presumption.
A written instrument is presumptive evidence of consideration, but that presumption is rebuttable and not conclusive, and a party seeking to avoid or invalidate the contract may introduce evidence of a lack of consideration. Lewis v. Fletcher, 101 Idaho 530, 617 P.2d 834 (1980).

Cited in: Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549 (1930); Tobias v. Wolverine Min. Co., 52 Idaho 576, 17 P.2d 338 (1932); Aker v. Aker, 52 Idaho 713, 20 P.2d 796 (1933); Robertson v. Hansen, 89 Idaho 107, 403 P.2d 585 (1965); Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967); W.L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982); Dennett v. Kuenzli, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

29-105. Contracts may be oral. — All contracts may be oral except such as are specially required by statute to be in writing.

History.
R.S., § 3224; reen. R.C. & C.L., § 3316; C.S., § 5665; I.C.A., § 28-105.

STATUTORY NOTES

Cross References.
Contracts required to be in writing, § 9-505 et seq.

Goods and choses in action over $500, written contracts, § 28-2-201.

29-106. Contract not put in writing through fraud. — Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

History.
R.S., § 3225; reen. R.C. & C.L., § 3317; C.S., § 5666; I.C.A., § 28-106.

JUDICIAL DECISIONS

Estoppel.
Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out provisions of the agreement, defendant cannot assert in an action to enforce the contract that contract is void under the statute of frauds because he did not in fact sign the same. Ferguson v. Blood, 152 F. 98 (9th Cir. 1907).

This estoppel arises when one by his acts, representations, or silence induces another to believe certain facts to exist and such other, relying and acting on such belief, is thereby prejudiced. Leaf v. Codd, 41 Idaho 547, 240 P. 593 (1925).

Cited in: Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915).

29-107. Corporate or official seal — How affixed. — A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

History.
R.S., § 3226; reen. R.C. & C.L., § 3318; C.S., § 5667; I.C.A., § 28-107.

29-108. Distinction as to sealed instruments abolished. — All distinctions between sealed and unsealed instruments are abolished.

History.
R.S., § 3227; reen. R.C. & C.L., § 3319; C.S., § 5668; I.C.A., § 28-108.

29-109. Construction of conflicting provisions. — Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their

intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded.

History.

R.S., § 3228; reen. R.C. & C.L., § 3320; C.S., § 5669; I.C.A., § 28-109.

JUDICIAL DECISIONS

Analysis

Addenda.
Intention of parties.
Limitations and construction.
Writing controls printing.

Addenda.

In a dispute over a land-sale contract, even though addenda were controlling over inconsistent provisions in a pre-printed contract, they did not create any additional duty on the part of the seller beyond his obligation to make a good faith effort to obtain marketable title. Johnson v. Lambros, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

Intention of Parties.

Contract will be construed in the light of surrounding facts and circumstances to arrive at the real intention of the parties. Wood River Power Co. v. Arkoosh, 37 Idaho 348, 215 P. 975 (1923).

Object and purpose of contract may well be taken into consideration in arriving at a correct understanding of what the parties had in mind in using words, the meaning of which is in controversy. Clarke v. Blackfoot Waterworks, 39 Idaho 304, 228 P. 326 (1924).

Primary test as to character of contract is the intention of the parties to be gathered from the whole scope and effect of language used. Wallace Bank & Trust Co. v. First Nat'l Bank, 40 Idaho 712, 237 P. 284 (1925).

Limitations and Construction.

Courts cannot make contracts for parties. Smith v. Krall, 9 Idaho 535, 75 P. 263 (1904); Machold v. Farnan, 14 Idaho 258, 94 P. 170 (1908); Sorensen v. Larue, 43 Idaho 292, 252 P. 494 (1926).

No recovery of purchase money paid on an executory contract for sale of land can be recovered by vendee on rescission of contract, unless rescission agreement expressly or impliedly provides therefor. Williams v. Skelton, 40 Idaho 741, 237 P. 412 (1925).

Writing Controls Printing.

Words "to be paid as loaded," written into contract with pencil, prevail over that portion of printed contract providing for payment "upon the completion of loading on board cars for shipment." Idaho Prods. Co. v. Bales, 36 Idaho 800, 214 P. 206 (1923).

Typewritten parts of a contract prevail over the printed parts. Weeter v. Reynolds, 48 Idaho 611, 284 P. 257 (1930).

Where contract is partly written and partly printed, written parts control printed parts, unless parts which are antagonistic can be reconciled. Ries v. Pacific Fruit & Produce Co., 50 Idaho 140, 294 P. 336 (1930).

Where the word "Idaho" in certificate of acknowledgment was stricken in two places to change the printed form to make it properly applicable to "Utah" and the word "Utah" was written in both places with a pen, the error in failing to strike the word Idaho and substitute the word "Utah" in one instance was apparently a clerical error which did not vitiate the instrument when read in its entirety, the intent being clearly inferable. Pacific Coast Joint Stock Land Bank v. Security Prods. Co., 56 Idaho 436, 55 P.2d 716 (1936).

In an action by a lessor against the lessee for breach of contract for failure to deliver an operable radiant heating system at the expiration of the lease of a gasoline service station site, where a letter between the parties written after execution of the lease agreement modified and expanded the lease by adding the radiant heating terms to the basic agreement, written provisions of the letter were part of the same contract and controlled over conflicting provisions of the printed form. Werry v. Phillips Petroleum Co., 97 Idaho 130, 540 P.2d 792 (1975).

Where more specific "due-on-sale" provision of contract was a typed additional provision to the contract while general "due-on-sale" provision was a clause set forth in the printed form, the more specific provision controlled.

Barr Dev., Inc. v. Utah Mtg. Loan Corp., 106 Idaho 46, 675 P.2d 25 (1983).

Cited in: Turner v. Mendenhall, 95 Idaho 426, 510 P.2d 490 (1973); Airstream, Inc. v. CIT Fin. Servs., Inc., 111 Idaho 307, 723 P.2d 851 (1986).

29-110. Limitations on right to sue under contract or franchise agreement. — (1) Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.

(2) Any condition, stipulation or provision in a franchise agreement is void to the extent it purports to waive, or has the effect of waiving, venue or jurisdiction of the state of Idaho's court system. Any condition, stipulation or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting, the choice of law is enforceable. This subsection shall apply to any franchise agreement entered into or renewed on or after July 1, 2003, by any person who at the time of entering into or renewing such franchise agreement was a resident of this state or incorporated or organized under the laws of this state.

(3) As used in this section "franchise agreement" means a written contract or agreement by which:

(a) A person ("franchisee") is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a third party ("franchisor");

(b) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor of such plan or system; and

(c) The franchisee is required to pay the franchisor one thousand dollars ($1,000) or more for the right to transact business pursuant to the plan or system. Such payments shall not include amounts paid:

(i) As a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring the credit card; or

(ii) For the purchase of goods at a bona fide wholesale price.

History.

R.S., § 3229; reen. R.C. & C.L., § 3321; C.S., § 5670; I.C.A., § 28-110 am. 2003, ch. 378, § 1, p. 1010; am. 2012, ch. 328, § 1, p. 909.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 328, inserted "under contract or" in the section heading; in subsection (1), substituted "under the contract in Idaho tribunals" for "under the contract by the usual proceedings in the ordinary tribunals" and added "as it is against the public policy of Idaho" in the first sentence; and added the last sentence.

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Analysis

Arbitration.

Stipulation in a building contract to submit differences to arbitrators whose decision shall be final is void. Huber v. St. Joseph's Hosp., 11 Idaho 631, 83 P. 768 (1905).

Compensation Paid Under Federal Law.

Even if an Idaho court would allow reformation of an insurance policy, it would not recognize the parties' choice of Illinois law on the statute of limitation issue, where Idaho had a materially greater interest in the statute of limitation as the forum state within which the damaged property was located and Idaho has expressed a fundamental policy by requiring strict adherence to its statutory limitations period. Industrial Indem. Ins. Co. v. United States, 757 F.2d 982 (9th Cir. 1985).

Compromise Agreements.

By commencing and maintaining action for specific performance of original contract, entering into compromise agreement continuing action for specific performance, and failing to dismiss such action before commencing subsequent action, party elected to rely upon remedy afforded by former action. Christman v. Rinehart, 46 Idaho 701, 270 P. 1059 (1928).

Federal Law.

Idaho law could not be applied in place of federal maritime law where the suit arose from a tort occurring on the high seas and involved the interpretation of a maritime contract for a cruise to Mexico; no public policy exceptions were controlling in an international commercial agreement outside of American waters. Fisk v. Royal Caribbean Cruises, 141 Idaho 290, 108 P.3d 990 (2005).

Fire Insurance Policy.

Statutory amendment by implication is disfavored and will not be inferred absent clear legislative intent; accordingly, the legislature, by providing in § 41-2401 that no fire insurer shall issue fire insurance on a form other than the "New York Standard as Revised in 1943," did not intend to amend the general five-year statute of limitations upon actions brought upon written contracts and did not create a one-year statute of limitations with respect to actions on policies of fire insurance. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 107 Idaho 25, 684 P.2d 1002 (1984).

Provisions within fire insurance policies attempting to limit to one year the time for filing actions on the insurance policies were void under this section. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 107 Idaho 25, 684 P.2d 1002 (1984).

Section 41-2401 requires that fire insurers issue policies only on the New York standard form as revised in 1943; the form includes a clause specifying a 12-month limitation period for claims. However, § 5-216 establishes a five-year statute of limitation for contracts, including insurance policies, and this section prohibits any condition in a contract that would reduce that period; thus, the applicable limitations period for the commencement of a suit for reimbursement was five years. Industrial Indem. Ins. Co. v. United States, 749 F.2d 1390 (9th Cir. 1984).

Forum Selection Clauses.

In case where Florida law controlled as to the enforceability of forum selection clauses, and where Florida law stated that, in order for forum selection clauses to be enforceable, enforcement could not contravene a strong policy enunciated by statute either in the forum where the suit was brought or the forum from which the suit was excluded, this section expressed a strong public policy against the enforcement of forum selection clauses; therefore, forum selection clause in the case could not stand. Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 773 P.2d 1143 (1989).

Land Contracts.

Provision of contract for sale of land that, on nonpayment of consideration, premises should be surrendered by purchasers and payments previously made should be retained by vendors as rent, does not violate this section. McCutcheon v. Thomas, 47 Idaho 188, 273 P. 950 (1928).

Limitation of Actions.

Provision in a contract of issuance to the effect that no action at law or suit in equity shall be commenced before three months nor after six months from date on which affirmative proof of accident must be furnished to the company is repugnant to this section. Douville v. Pacific Coast Cas. Co., 25 Idaho 396, 138 P. 506 (1914).

Provision in a benefit certificate of a fraternal insurance society to the effect that no action may be maintained thereon unless brought within one year of date of death violates this section and is void. Gaffney v. Royal Neighbors of Am., 31 Idaho 549, 174 P. 1014 (1918).

Provision in health and accident policy that no action could be brought on the policy, unless brought within two years after expiration of time to make proof of loss, is void under this section. Harding v. Mutual Benefit Health & Accident Ass'n, 55 Idaho 131, 39 P.2d 306 (1934).

Municipal Contracts.

Provision in contract with municipality that decision of engineer should be binding on parties does not restrict either party from enforcing rights in court and is not in conflict with this section. White v. Soda Springs, 46 Idaho 153, 266 P. 795 (1928).

Venue of Actions.

Stipulation seeking to authorize commencement of action in any other county than that fixed by statute is not binding upon parties. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

Waiver of Right.

Clause in a promissory note waiving all rights of appeal is in violation of this section. GMAC v. Talbott, 38 Idaho 13, 219 P. 1058 (1923).

Cited in: Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai County, 104 Idaho 590, 661 P.2d 756 (1983); Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001).

29-111. Debtor may demand receipt. — A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

History.

R.S., § 3230; reen. R.C. & C.L., § 3322; C.S., § 5671; I.C.A., § 28-111.

29-112. Objection to offer of performance. — All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated.

History.

R.S., § 3231; reen. R.C. & C.L., § 3323; C.S., § 5672; I.C.A., § 28-112.

JUDICIAL DECISIONS

ANALYSIS

Estoppel.
Tender.

Estoppel.

When a contract was rescinded for fraud as to water rights on lands purchased, the federal court, following the interpretation of this section by the Idaho supreme court, held the vendor was estopped from claiming taxes or rent. Oregon Mtg. Co. v. Renner, 17 F. Supp. 727 (D. Idaho 1937), aff'd, 96 F.2d 429 (9th Cir. 1938).

Where the creditor had not only the opportunity to object but was invited to do so and did nothing, he cannot now complain of the procedure suggested to close the transaction. Dohrman v. Tomlinson, 88 Idaho 313, 399 P.2d 255 (1965).

Tender.

Conditional tender by mortgagor to assignee of mortgage held good where not objected to, although time for objecting was

short. Harding v. Home Inv. & Sav. Co., 49 Idaho 64, 286 P. 920, rehearing denied, 49 Idaho 64, 75, 297 P. 1101 (1930).

When no objection is made either to the mode, form or substance of the offer, it constitutes a legal tender. Allis-Chalmers Mfg. Co. v. Harris, 56 Idaho 769, 59 P.2d 345 (1936).

Where vendee made no objection to a tender and offer of an abstract of title, when there was opportunity to do so, he could not later complain of the insufficiency of the offer or the failure of vendor to produce or actually to deliver the extended abstract. Metzker v. Lowther, 69 Idaho 155, 204 P.2d 1025 (1949).

Where a bank's objection, if it could have been so characterized, was based upon the lateness of the property owners' tender of the money necessary to cure the default on their note, not upon the "mode" of payment or of any offer to pay, the property owners' failure to effect a timely cure was not excused by application of this section since there was nothing in this section that would have required the bank to anticipate a late tender and to give special notice of the obvious — that an untimely tender could be rejected. Owens v. Idaho First Nat'l Bank, 103 Idaho 465, 649 P.2d 1221 (Ct. App. 1982).

Seller's action in making premature withdrawal of escrow papers did not deprive the purchasers of their contract right to cure the existing default within 30 days after the second default notice; it is uncontroverted that on the 30th day the purchasers tendered a partial cure after the papers had been returned and the escrow holder rejected the tender upon the seller's instruction for the contract made no provision for partial cure and the seller was under no general legal obligation of specific statutory obligation. Aldape v. Lubcke, 107 Idaho 316, 688 P.2d 1221 (Ct. App. 1984).

Cited in: Moody v. Crane, 34 Idaho 103, 199 P. 652 (1921).

29-113. Release for personal injury. — Any agreement entered into by any person within fifteen (15) days after he incurs a personal injury, which may adversely affect his right to be compensated for such injury, may be disavowed by such injured person within one (1) year after the making of the agreement. No agreement disavowed may be introduced as evidence in any subsequent court or administrative proceeding.

History.

1961, ch. 160, § 1, p. 231.

JUDICIAL DECISIONS

Cited in: Larson v. Emmett Joint Sch. Dist., No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

29-114. Indemnification of promisee for negligence — Effect on existing agreements. — A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective.

History.

1971, ch. 46, § 1, p. 100.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1971, ch. 46, which is compiled as this section.

The phrase "at the time the act becomes effective" refers to the effective date of S.L. 1971, ch. 46, which was May 18, 1971.

JUDICIAL DECISIONS

Jury Instructions.

In personal injury action against city, telephone company and two contractors where both contractors admitted that they were responsible for leaving the work area where plaintiff's motorcycle accident occurred in a safe condition for the motoring public and for properly marking or signing the area with appropriate warning devices if the area could not be left in a safe condition for the motoring public, jury instruction that, in determining any negligence of the city or the telephone company, the jury was allowed to consider only whether the city or the telephone company failed to discover or remedy any defect in the street or any inadequacy in warning of a defect caused by the contractors was correct; therefore, the city was not entitled to indemnification by the telephone company and was not an indemnitee of the telephone company, as referred to in this section; thus, indemnification clause of agreement between phone company and one contractor did not violate this section. Beitzel v. City of Coeur d'Alene, 121 Idaho 709, 827 P.2d 1160 (1992).

Cited in: Steiner Corp. v. American Dist. Tel., 106 Idaho 787, 683 P.2d 435 (1984).

29-115. Construction contracts. — (1) This section is applicable with respect to all contracts entered into on or after July 1, 1990, between owners and original contractors relating to the construction of any private work of improvement.

(2) In any contract relating to the construction of any private work of improvement, the retention proceeds withheld by the owner from the original contractor or by the original contractor from any subcontractor from any payment shall not exceed five percent (5%) of the payment and in no event shall the total retention withheld exceed five percent (5%) of the contract price. However, the five percent (5%) maximum that may be withheld does not apply if the original contractor or the subcontractor fails to provide a performance bond issued by a surety acceptable to the owner or original contractor if requested to do so by the owner or original contractor respectively. The five percent (5%) maximum shall not apply to any contract for the performance of a private work of improvement to residential real property consisting of one (1) to four (4) units occupied or to be occupied by the owner.

(3) Within thirty-five (35) days from the date on which the work of improvement is substantially complete, as mutually agreed to by the parties to the contract, the retention withheld by the owner shall be reduced to the lesser of one hundred fifty percent (150%) of the estimated value of work yet to be completed in accordance with the contract or the retention then withheld by the owner, not to exceed five percent (5%) of the contract price.

Within thirty-five (35) days from the date of final completion of the work of improvement, the retention withheld by the owner shall be released, except in the event of a dispute between the owner and the original contractor, the owner may withhold from the final retention payment an amount not to exceed one hundred fifty percent (150%) of the estimated value of the issue in dispute. The owner may condition the final release of

the retention upon receipt of satisfactory lien waivers from all persons with actual or potential lien claims on the work of improvement.

(4) Subject to subsection (5) of this section, within ten (10) days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor.

(5) The original contractor shall not be required to pay the retention to a subcontractor if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed one hundred fifty percent (150%) of the estimated value of the work yet to be completed or issue in dispute.

(6) It shall be against public policy for any party to require any other party to waive any provision of this statute.

History.

I.C., § 29-115, as added by 1990, ch. 415, § 1, p. 1151; am. 1998, ch. 271, § 1, p. 899.

29-116. Computer information agreements. — (1) In an action based on a computer information agreement that contains a choice of laws provision that would result in application of the uniform computer information transactions act to such computer information agreement, such choice of laws provision is voidable by the party against whom enforcement is sought, and the agreement will be governed by the laws of the state of Idaho if either party is a resident of this state or has its principal place of business located in this state.

(2) In an action based on a computer information agreement that does not contain a choice of laws provision, any party may object to the application of the uniform computer information transactions act to such computer information agreement. If such an objection is made, the agreement will be governed by the laws of the state of Idaho if either party is a resident of this state or has its principal place of business in this state.

(3) This section may not be varied or invalidated by the agreement of the parties.

(4) As used in this section:

(a) "Computer information" means information in electronic form that is obtained from or through the use of a computer or that is in a form capable of being processed by a computer.

(b) "Computer information agreement" means a contract or agreement to create, modify, transfer, license or otherwise use computer information or rights in computer information, or to perform or support such creation, modification, transfer, license or use.

(c) "Party" means a party to a computer information agreement.

(d) "Uniform computer information transactions act" means the uniform computer information transactions act as approved by the national

conference of commissioners on uniform state laws and enacted in any jurisdiction, or any substantially similar law enacted in any jurisdiction.

History.

I.C., § 29-116, as added by 2007, ch. 286, § 1, p. 815.

STATUTORY NOTES

Prior Laws.

Former § 29-116, which comprised I.C., § 29-116, as added by 1993, ch. 397, § 2, p. 1460, expired on July 1, 1995, was automatically repealed and became null and void pursuant to § 3 of S.L. 1993, ch. 397.

Compiler's Notes.

As of May 2013, the uniform computer transaction act had been adopted only in Virginia and Maryland. See *http://www.uniformlaws.org/shared/docs/computer_information_ transactions/ucita_ final_ 02.pdf.*

TITLE 30

CORPORATIONS

CHAPTER 1

GENERAL BUSINESS CORPORATIONS

30-1-1 — 30-1-153. Classification — Purpose — Articles of incorporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

The following sections of the former Idaho Business Corporation Act were repealed by § 1 of S.L. 1997, ch. 366 unless otherwise noted. Where a section has a designation "Reserved" this means that the section number was reserved but that no such section was ever enacted.

30-1-1. Short title. I.C., § 30-1-1 as added by 1979 ch. 105, § 2, p. 251.

30-1-2. Definitions. I.C., § 30-1-2, as added by 1979 ch. 105, § 2, p. 251; am. 1980, ch. 197, § 1, p. 433.

30-1-3. Purposes. I.C., § 30-1-3, as added by 1979, ch. 105, § 2, p. 251.

30-1-4. General powers. I.C., § 30-1-4, as added by 1979, ch. 105, § 2, p. 251.

30-1-5. Indemnification of officers, directors, employees and agents. I.C., § 30-1-5, as added by 1979, ch. 105, § 2, p. 251; am. 1987, ch. 221, § 1, p. 471.

30-1-6. Right of corporation to acquire and dispose of its own shares. I.C., 30-1-6, as added by 1979, ch. 105, § 2, p. 251.

30-1-7. Defense of ultra vires. I.C., § 30-1-7, as added by 1979, ch. 105, § 2, p. 251.

30-1-8. Corporate name. I.C., § 30-1-8, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 405, § 1, p. 1272.

30-1-9. Reserved name. I.C., § 30-1-9, as added by 1979, ch. 105, § 2, p. 251.

30-1-10. Registered name. I.C., § 30-1-10, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 2, p. 117; am. 1994, ch. 405, § 2, p. 1272.

30-1-11. Renewal of registered name. I.C., § 30-1-11, as added by 1979, ch. 105, § 2, p. 251.

30-1-12. Registered office and registered agent. I.C., § 30-1-12, as added by 1979, ch. 105, § 2, p. 251.

30-1-13. Change of registered office or registered agent. I.C., § 30-1-13, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 1, p. 443; am. 1985, ch. 148, § 1, p. 394.

30-1-14. Service of process on corporation. I.C., § 30-1-14, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 2, p. 433.

30-1-15. Authorized shares. I.C., § 30-1-15, as added by 1979, ch. 105, § 2, p. 251.

30-1-16. Issuance of shares of preferred or special classes in series. I.C., § 30-1-16, as added by 1979, ch. 105, § 2, p. 251.

30-1-17. Subscriptions for shares. I.C., § 30-1-17, as added by 1979, ch. 105, § 2, p. 251.

30-1-18. Consideration for shares. I.C., § 30-1-18, as added by 1979, ch. 105, § 2, p. 251.

30-1-19. Payment for shares. I.C., § 30-1-19, as added by 1979, ch. 105, § 2, p. 251.

30-1-19A. Assessment and sale of shares. I.C., § 30-1-19A, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 3, p. 433.

30-1-20. Stock rights and options. I.C., § 30-1-20, as added by 1979, ch. 105, § 2, p. 251.

30-1-21. Determination of amount of stated capital. I.C., § 30-1-21, as added by 1979, ch. 105, § 2, p. 251.

30-1-22. Expenses of organization, reorganization and financing. I.C., § 30-1-22, as added by 1979, ch. 105, § 2, p. 251.
30-1-23. Certificates representing shares. I.C., § 30-1-23, as added by 1979, ch. 105, § 2, p. 251.
30-1-23A. Restriction on transfer of shares. I.C., § 30-1-23A, as added by 1979, ch. 105, § 2, p. 251.
30-1-24. Fractional shares. I.C., § 30-1-24, as added by 1979, ch. 105, § 2, p. 251.
30-1-25. Liability of subscribers and shareholders. I.C., § 30-1-25, as added by 1979, ch. 105, § 2, p. 251.
30-1-26. Shareholders' preemptive rights. I.C., § 30-1-26, as added by 1979, ch. 105, § 2, p. 251.
30-1-27. Bylaws. I.C., § 30-1-27, as added by 1979, ch. 105, § 2, p. 251.
30-1-28. Meetings of shareholders. I.C., § 30-1-28, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 4, p. 433.
30-1-29. Notice of shareholders' meetings. I.C., § 30-1-29, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 1, p. 724.
30-1-30. Closing of transfer books and fixing record date. I.C., § 30-1-30, as added by 1979, ch. 105, § 2, p. 251.
30-1-31. Voting record. I.C., § 30-1-31, as added by 1979, ch. 105, § 2, p. 251.
30-1-32. Quorum and voting requirements for shareholders' meetings. I.C., § 30-1-32, as added by 1979, ch. 105, § 2, p. 251.
30-1-33. Voting of shares — Proxies. I.C., § 30-1-33, as added by 1979, ch. 105, § 2, p. 251; am. 1983, ch. 201, § 1, p. 545.
30-1-34. Voting trusts and agreements among shareholders. I.C., § 30-1-34, as added by 1979, ch. 105, § 2, p. 251.
30-1-35. Board of directors. I.C., § 30-1-35, as added by 1979, ch. 105, § 2, 251; am. 1979, ch. 282, § 2, p. 724.
30-1-36. Number and election of directors. I.C., § 30-1-36, as added by 1979, ch. 105, § 2, p. 251.
30-1-37. Classification of directors. I.C., § 30-1-37, as added by 1983, ch. 166, § 2, p. 472.
30-1-38. Vacancies. I.C., § 30-1-38, as added by 1979, ch. 105, § 2, p. 251.
30-1-39. Removal of directors. I.C., § 30-1-39, as added by 1979, ch. 105, § 2, p. 251.
30-1-40. Quorum and voting requirements for directors' meetings. I.C., § 30-1-40, as added by 1979, ch. 105, § 2, p. 251.
30-1-41. Director conflicts of interest. I.C., § 30-1-41, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 5, p. 433.
30-1-42. Executive and other committees. I.C., § 30-1-42, as added by 1979, ch. 105, § 2, p. 251.
30-1-43. Place and notice of directors' meetings — Committee meetings. I.C., § 30-1-43, as added by 1979, ch. 105, § 2, p. 251.
30-1-44. Action by directors without a meeting. I.C., § 30-1-44, as added by 1979, ch. 105, § 2, p. 251.
30-1-45. Dividends. I.C., § 30-1-45, as added by 1979, ch. 105, § 2, p. 251.
30-1-46. Distributions from capital surplus. I.C., § 30-1-46, as added by 1979, ch. 105, § 2, p. 251.
30-1-47. Loans to employees and directors. I.C., § 30-1-47, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 3, p. 724.
30-1-48. Liability of directors in certain cases. I.C., § 30-1-48, as added by 1979, ch. 105, § 2, p. 251.
30-1-49. Provisions relating to actions by shareholders. I.C., § 30-1-49, as added by 1979, ch. 105, § 2, p. 251.
30-1-50. Officers. I.C., § 30-1-50, as added by 1979, ch. 105, § 2, p. 251.
30-1-51. Removal of officers. I.C., § 30-1-51, as added by 1979, ch. 105, § 2, p. 251.
30-1-52. Books and records. I.C., § 30-1-52, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 6, p. 433.
30-1-53. Incorporators. I.C., § 30-1-53, as added by 1979, ch. 105, § 2, p. 251.
30-1-54. Articles of incorporation. I.C., § 30-1-54, as added by 1979, ch. 105, § 2, p. 251; am. 1987, ch. 221, § 2, p. 471; am. 1995, ch. 126, § 1, p. 542.
30-1-55. Filing of articles of incorporation. I.C., § 30-1-55, as added by 1979, ch. 105, § 2, p. 251.
30-1-56. Effect of issuance of certificate of incorporation. I.C., § 30-1-56, as added by 1979, ch. 105, § 2, p. 251.
30-1-57. Organization meeting of directors. I.C., § 30-1-57, as added by 1979, ch. 105, § 2, p. 251.
30-1-58. Right to amend articles of incorporation. I.C., § 30-1-58, as added by 1979, ch. 105, § 2, p. 251.
30-1-59. Procedure to amend articles of incorporation. I.C., § 30-1-59, as added by 1979, ch. 105, § 2, p. 251; am. 1983, ch. 201, § 2, p. 545.
30-1-60. Class voting on amendments. I.C., § 30-1-60, as added by 1979, ch. 105, § 2, p. 251.
30-1-61. Articles of amendment. I.C., § 30-1-61, as added by 1979, ch. 105, § 2, p. 251; am. 1995, ch. 126, § 2, p. 542.
30-1-62. Filing of articles of amendment. I.C., § 30-1-62, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 3, p. 117.
30-1-63. Effect of certificate of amendment. I.C., § 30-1-63, as added by 1979, ch. 105, § 2, p. 251.
30-1-64. Restated articles of incorporation. I.C., § 30-1-64, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 4, p. 117; am. 1995, ch. 126, § 3, p. 542.
30-1-65. Amendment of articles of incorporation in reorganization proceedings. I.C.,

§ 30-1-65, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 7, p. 433; am. 1984, ch. 67, § 5, p. 117; am. 1995, ch. 126, § 4, p. 542.

30-1-66. Restriction on redemption or repurchase of redeemable shares. I.C., § 30-1-66, as added by 1979, ch. 105, § 2, p. 251.

30-1-67. Cancellation of redeemable shares by redemption or purchase. I.C., § 30-1-67, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 6, p. 117; am. 1995, ch. 126, § 5, p. 542.

30-1-68. Cancellation of other reacquired shares. I.C., § 30-1-68, as added by 1979, ch. 105, § 2, p. 251.

30-1-69. Reduction of stated capital in certain cases. I.C., § 30-1-69, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 7, p. 117; am. 1995, ch. 126, § 6, p. 542.

30-1-70. Special provisions relating to surplus and reserves. I.C., § 30-1-70, as added by 1979, ch. 105, § 2, p. 251.

30-1-71. Procedure for merger. I.C., § 30-1-71, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 1, p. 916.

30-1-72. Procedure for consolidation. I.C., § 30-1-72, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 2, p. 916.

30-1-72A. Procedure for share exchange. I.C., § 30-1-72A, as added by 1979, ch. 105, § 2, p. 251.

30-1-73. Approval by shareholders. I.C., § 30-1-73, as added by 1979, ch. 105, § 2, p. 251.

30-1-74. Articles of merger — Consolidation or exchange. I.C., § 30-1-74, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 8, p. 117; am. 1995, ch. 126, § 7, p. 542.

30-1-75. Merger of subsidiary corporation. I.C., § 30-1-75, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 9, p. 117; am. 1995, ch. 126, § 8, p. 542.

30-1-76. Effect of merger, consolidation or exchange. I.C., § 30-1-76, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 3, p. 916.

30-1-77. Merger, consolidation or exchange of shares between domestic and foreign corporations and/or limited liability companies. I.C., § 30-1-77, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 8, p. 433; am. 1994, ch. 293, § 4, p. 916.

30-1-78. Sale of assets in regular course of business and mortgage or pledge of assets. I.C., § 30-1-78, as added by 1979, ch. 105, § 2, p. 251.

30-1-79. Sale of assets other than in regular course of business. I.C., § 30-1-79, as added by 1979, ch. 105, § 2, p. 251.

30-1-80. Right of shareholders to dissent and obtain payment for shares. I.C., § 30-1-80, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 2, p. 443.

30-1-81. Procedures for protection of dissenters' rights. I.C., § 30-1-81, as added by 1979, ch. 105, § 2, p. 251.

30-1-82. Voluntary dissolution by incorporators or initial directors. I.C., § 30-1-82, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 9, p. 433; am. 1984, ch. 67, § 10, p. 117; am. 1995, ch. 126, § 9, p. 542.

30-1-83. Voluntary dissolution by consent of shareholders. I.C., § 30-1-83, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 21, p. 433.

30-1-84. Voluntary dissolution by act of corporation. I.C., § 30-1-84, as added by 1979, ch. 105, § 2, p. 251.

30-1-85 — 30-1-86. [Reserved.]

30-1-87. Procedure after approval of dissolution. I.C., § 30-1-87, as added by 1979, ch. 105, § 2, p. 251.

30-1-88. Revocation of voluntary dissolution proceedings. I.C., § 30-1-88, as added by 1979, ch. 105, § 2, p. 251.

30-1-89 — 30-1-91. [Reserved.]

30-1-92. Articles of dissolution. I.C., § 30-1-92, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 22, p. 433; am. 1995, ch. 126, § 10, p. 542.

30-1-93. Filing of articles of dissolution. I.C., § 30-1-93, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 11, p. 117.

30-1-94. Involuntary dissolution. I.C., § 30-1-94, as added by 1979, ch. 105, § 2, p. 251.

30-1-95. Notification to Attorney General. I.C., § 30-1-95, as added by 1979, ch. 105, § 2, p. 251.

30-1-96. Venue and process. I.C., § 30-1-96, as added by 1979, ch. 105, § 2, p. 251.

30-1-97. Jurisdiction of court to liquidate assets and business of corporation. I.C., § 30-1-97, as added by 1979, ch. 105, § 2, p. 251.

30-1-98. Procedure in liquidation of corporation by court. I.C., § 30-1-98, as added by 1979, ch. 105, § 2, p. 251.

30-1-99. Qualifications of receivers. I.C., § 30-1-99, as added by 1979, ch. 105, § 2, p. 251.

30-1-100. Filing of claims in liquidation proceedings. I.C., § 30-1-100, as added by 1979, ch. 105, § 2, p. 251.

30-1-101. Discontinuance of liquidation proceedings. I.C., § 30-1-101, as added by 1979, ch. 105, § 2, p. 251.

30-1-102. Decree of involuntary dissolution. I.C., § 30-1-102, as added by 1979, ch. 105, § 2, p. 251.

30-1-103. Filing of decree of dissolution. I.C., § 30-1-103, as added by 1979, ch. 105, § 2, p. 251.

30-1-104. Deposit with state tax commission of amount due certain shareholders. I.C., § 30-1-104, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 36, § 2, p. 60.

30-1-105. Survival of remedy after dissolution. I.C., § 30-1-105, as added by 1979, ch.

105, § 2, p. 251; am. 1980, ch. 197, § 10, p. 433; am. 1988, ch. 9, § 1, p. 11.

30-1-106. Admission of foreign corporation. I.C., § 30-1-106, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 4, p. 724.

30-1-107. Powers of foreign corporation. I.C., § 30-1-107, as added by 1979, ch. 105, § 2, p. 251.

30-1-108. Corporate name of foreign corporation. I.C., § 30-1-108, as added by 1979, ch. 105, § 2, p. 251.

30-1-109. Change of name by foreign corporation. I.C., § 30-1-109, as added by 1979, ch. 105, § 2, p. 251.

30-1-110. Application for certificate of authority. I.C., § 30-1-110, as added by 1979, ch. 105, § 2, p. 251; am. 1985, ch. 148, § 2, p. 394; am. 1995, ch. 126, § 11, p. 542.

30-1-111. Filing of application for certificate of authority. I.C., § 30-1-111, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 12, p. 117.

30-1-112. Effect of certificate of authority. I.C., § 30-1-112, as added by 1979, ch. 105, § 2, p. 251.

30-1-113. Registered office and registered agent of foreign corporation. I.C., § 30-1-113, as added by 1979, ch. 105, § 2, p. 251.

30-1-114. Change of registered office or registered agent of foreign corporation. I.C., § 30-1-114, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 3, p. 443; am. 1985, ch. 148, § 3, p. 394.

30-1-115. Service of process on foreign corporation. I.C., § 30-1-115, as added by 1979, ch. 105, § 2, p. 251.

30-1-116, 30-1-117. Foreign corporation — Amendment of articles, merger. [Repealed.] These sections, which comprised I.C., §§ 30-1-116, 30-1-117, as added by 1979, ch. 105, § 2, p. 251, were repealed by S.L. 1984, ch. 67, § 13.

30-1-118. Amended certificate of authority. I.C., § 30-1-118, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 14, p. 117.

30-1-119. Withdrawal of foreign corporation. I.C., § 30-1-119, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 15, p. 117; am. 1995, ch. 126, § 12, p. 542.

30-1-120. Filing of application for withdrawal. I.C., § 30-1-120, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 16, p. 117.

30-1-121. Revocation of certificate of authority. I.C., § 30-1-121, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 11, p. 433.

30-1-122. Issuance of certificate of revocation. I.C., § 30-1-122, as added by 1979, ch. 105, § 2, p. 251.

30-1-123. Application to corporations heretofore authorized to transact business in this state. I.C., § 30-1-123, as added by 1979, ch. 105, § 2, p. 251.

30-1-124. Transacting business without certificate of authority. I.C., § 30-1-124, as added by 1979, ch. 105, § 2, p. 251.

30-1-125. Annual report of domestic and foreign corporations. I.C., § 30-1-125, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 4, p. 443; am. 1985, ch. 148, § 4, p. 394; am. 1995, ch. 126, § 13, p. 542.

30-1-126. Filing of annual report of domestic and foreign corporations. I.C., § 30-1-126, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 12, p. 433; am. 1982, ch. 233, § 1, p. 614; am. 1995, ch. 126, § 14, p. 542.

30-1-127. Fees and charges to be collected by Secretary of State. I.C., § 30-1-127, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 13, p. 433.

30-1-128. Fees for filing documents and issuing certificates. I.C., § 30-1-128, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 14, p. 433; am. 1983, ch. 191, § 1, p. 520; am. 1984, ch. 67, § 17, p. 117; am. 1985, ch. 148, § 5, p. 394; am. 1993, ch. 338, § 1, p. 1268.

30-1-129. Miscellaneous charges. I.C., § 30-1-129, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 405, § 3, p. 1272.

30-1-129A. Corporation defined. [Repealed.] This section, which comprised I.C., § 30-1-129A, as added by 1980, ch. 197, § 15, p. 433, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-130. Franchise tax payable by domestic and foreign corporations. [Repealed.] This section, which comprised I.C., § 30-1-130, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-131. Collection of franchise tax — Priority over income tax. [Repealed.] This section, which comprised I.C., § 30-1-131, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-132. Exempt corporations. [Repealed.] This section, which comprised I.C., § 30-1-132, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-133. New corporations — Proration of minimum tax — Notice to tax commission. [Repealed.] This section, which comprised I.C., § 30-1-133, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 10, p. 443, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-134. Forfeiture of corporations. I.C., § 30-1-134, as added by 1979, ch. 105, § 2, p. 251; am. 1982, ch. 203, § 4, p. 533.

30-1-135. Consequences of forfeiture. I.C., § 30-1-135, as added by 1979, ch. 105, § 2, p. 251.

30-1-136. Trustees for forfeited corporations — Continuation of actions. I.C., § 30-1-136, as added by 1979, ch. 105, § 2, p. 251.

30-1-137. Reinstatement of corporations. I.C., § 30-1-137, as added by 1979, ch. 105, § 2, p. 251; am. 1982, ch. 203, § 5, p. 533.

30-1-137A. Limitation on amount of taxes and penalties on foreign corporations. [Repealed.] This section, which comprised I.C., § 30-1-137A, as added by 1982, ch. 203, § 6, p. 533, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-138. Dissolution of corporations ten years after forfeiture. I.C., § 30-1-138, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 11, p. 443.

30-1-139. Refund on franchise tax — When permitted. [Repealed.] This section, which comprised I.C., § 30-1-139, as added by 1979, ch. 105, § 2, p. 251 was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-140. [Reserved.]

30-1-141. Certificates and certified copies to be received in evidence. I.C., § 30-1-141, as added by 1979, ch. 105, § 2, p. 251.

30-1-142. Forms to be furnished by Secretary of State. I.C., § 30-1-142, as added by 1979, ch. 105, § 2, p. 251.

30-1-143. Greater voting requirements. I.C., § 30-1-143, as added by 1979, ch. 105, § 2, p. 251.

30-1-144. Waiver of notice. I.C., § 30-1-144, as added by 1979, ch. 105, § 2, p. 251.

30-1-145. Action by shareholders without a meeting. I.C., § 30-1-145, as added by 1979, ch. 105, § 2, p. 251.

30-1-146. Unauthorized assumption of corporate powers. I.C., § 30-1-146, as added by 1979, ch. 105, § 2, p. 251.

30-1-147. Application. I.C., § 30-1-147, as added by 1979, ch. 105, § 2, p. 251.

30-1-148. Application to foreign and interstate commerce. I.C., § 30-1-148, as added by 1979, ch. 105, § 2, p. 251.

30-1-149. Reservation of power. I.C., § 30-1-149, as added by 1979, ch. 105, § 2, p. 251.

30-1-150. Effect of repeal of prior acts. I.C., § 30-1-150, as added by 1979, ch. 105, § 2, p. 251.

30-1-151. Effect of invalidity of part of this act. I.C., § 30-1-151, as added by 1979, ch. 105, § 2, p. 251.

30-1-152. References to repealed laws. I.C., § 30-1-152, as added by 1979, ch. 105, § 2, p. 251.

30-1-153. Liability for false statement. I.C., § 30-1-153, as added by 1995, ch. 126, § 15, p. 542.

30-101 — 30-103. Classification — Purpose — Articles of incorporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1929, ch. 262, §§ 1 to 3, p. 545; I.C.A., §§ 29-101 to 29-103; am. 1963, ch. 21, § 1, p. 162; am. 1963, ch. 282, § 15, p. 725; am. 1967, ch. 401, § 1, p. 207; am. 1969, ch. 182, § 1, p. 542; am. 1977, ch. 252, § 1, p. 738; am. 1978, ch. 308, §§ 3, 4, p. 771, were repealed by S. L. 1979, ch. 105, § 1.

30-104 — 30-106. Railroad, wagonroad, telephone or telegraph corporations. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised R.S., §§ 2580, 2582, 2583; 1905, p. 161, § 2; 1907, p. 472, § 1; reen. R.C. & C.L., §§ 2715, 2717, 2718; C.S., §§ 4697, 4699, 4700; I.C.A., §§ 29-104 to 29-106, were repealed by S.L. 1977, ch. 252, § 2.

30-107. Corporate name. [Repealed.]

STATUTORY NOTES

Prior Laws.

A former § 30-107, which comprised S.L. 1929, ch. 262, § 4, p. 545; I.C.A., § 29-107; am. 1977, ch. 252, § 3, p. 738, was repealed

by S.L. 1978, ch. 308, § 5.

Compiler's Notes.
This section, which comprised I.C., § 30-107, as added by 1978, ch. 308, § 6, p. 771, was repealed by S.L. 1979, ch. 105, § 1.

30-108 — 30-117. Filing of articles — Corporate powers — Shares. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised 1864, p. 543, §§ 3, 15; R.S., §§ 2585, 2634, 2635; reen. R.C. & C.L., §§ 2720, 2770, 2771; C.S., §§ 4703, 4753, 4754; 1929, ch. 262, §§ 5 to 11, p. 545; I.C.A., §§ 29-108 to 29-117; am. 1965, ch. 160, § 1, p. 310, were repealed by S. L. 1979, ch. 105, § 1.

30-117A. Nonprofit corporations — Organization — Shares of stock or certificates of membership. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-117A, as added by 1967, ch. 401, § 2, p. 1207, was repealed by S.L. 1977, ch. 252, § 4.

30-118 — 30-166. Certificates, bylaws, dividends, elections, etc. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised S.L. 1864, p. 543, §§ 5, 23; R.S., §§ 2594, 2602, 2603, 2611, 2612, 2648, 2649; am. 1907, p. 540, § 2; R.C. & C.L., §§ 2730, 2738, 2739, 2747, 2748, 2787, 2788; am. 1913, ch. 2, § 1, p. 4; C.S., §§ 4713, 4721, 4722, 4730, 4731, 4767, 4768; am. 1927, ch. 88, § 24, p. 107; am. 1927, ch. 126, § 1, p. 170; am. 1927, ch. 219, § 1, p. 317; S.L. 1929, ch. 262, §§ 12 to 50, p. 545; I.C.A., §§ 29-118 to 29-164; am. 1935, ch. 58, § 1, p. 111; 1935 (1st E.S.), ch. 62, § 1, p. 180; am. 1937, ch. 172, § 1, p. 280; am. 1943, ch. 97, § 1, p. 191; am. 1945, ch. 24, § 1, p. 31; am. 1945, ch. 26, § 1, p. 32; am. 1945, ch. 36, § 1, p. 47; am. 1945, ch. 70, § 1, p. 93; am. 1957, ch. 95, §§ 1, 2, p. 166; am. 1963, ch. 117, § 1, p. 344; am. 1967, ch. 272, §§ 3, 4, p. 745; am. 1967, ch. 401, § 3, p. 1207; am. 1970, ch. 48, § 1, p. 98; am. 1971, ch. 251, § 1, p. 1006; am. 1972, ch. 45, § 1, p. 83; am. 1973, ch. 104, § 1, p. 178; I.C., § 30-166, as added by 1976, ch. 352, § 1, p. 1163; am. 1977, ch. 252, § 5, p. 738; am. 1978, ch. 308, §§ 7 to 10, p. 771, were repealed by S.L. 1979, ch. 105, § 1.

Part 1. General Provisions

30-1-101. Short title. — This chapter shall be known and may be cited as the "Idaho Business Corporation Act."

History.
I.C., § 30-1-101, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Cross References.
Antitrust law, § 48-101 et seq.
Banking corporations, § 26-201 et seq.
Bridge, ferry, flume and boom corporations, § 30-701 et seq.
Canal corporations, § 30-801 et seq.

Cemetery maintenance districts, § 27-101 et seq.
Constitutional provisions governing corporations, Idaho Const., Art. XI.
Cooperative marketing associations, § 22-2601 et seq.
Criminal frauds in management of corporations, § 18-1901 et seq.
Declaratory judgment act, "corporation" included in term "person," § 10-1213.
Disposition of unclaimed property, § 14-501 et seq.
Directors and stockholders, statute of limitations as to actions against, § 5-237.
Dissolution of nonprofit corporations, § 30-3-110 et seq.
Electric power corporations, § 62-701 et seq.
Ferry, bridge, flume and boom corporations, § 30-701 et seq.
Fraternal benefit societies, § 41-3201 et seq.
Garnishment, service of writ on corporations, § 8-507.
Gas corporations, § 62-901 et seq.
Insurance companies, title 41, Idaho Code.
Investment securities under Uniform Commercial Code, § 28-8-101 et seq.
Irrigation companies, § 30-801 et seq.
Limitation of actions against directors or stockholders, § 5-237.
Monopolies, § 48-101 et seq.
Nonprofit corporations, § 30-3-1 et seq.
Railroad corporations, § 62-101 et seq.
Religious corporations, § 30-3-15.
Sale of franchise on execution, § 30-201 et seq.
Savings banks, § 26-1801 et seq.
Securities Act, § 30-14-101 et seq.
Shares of stock subject to attachment on execution, § 11-201.
Surety companies, § 41-2603 et seq.
Tax on corporate income, § 63-3001 et seq.
Telegraph, telephone and electric power corporations, § 62-701 et seq.
Transfer and inheritance tax on shares of domestic corporations owned by nonresidents, § 14-404.
Uniform Commercial Code, § 28-1-101 et seq.
Venue of actions against domestic corporations, § 5-404.
Water companies, § 30-801 et seq.
Water users' associations, § 30-804.

ABA OFFICIAL COMMENT

The short title provided by section 101 creates a convenient name for the state's business corporation act.

IDAHO REPORTER'S COMMENT

It is a common practice of modern legislative draftsmen to use "short title" sections to create a convenient and authoritative term of reference. The new Act retains the same short title from our previous act.

30-1-102. Reservation of power to amend or repeal. — The Idaho legislature has power to amend or repeal all or part of this chapter at any time and all domestic and foreign corporations subject to this chapter are governed by the amendment or repeal.

History.
I.C., § 30-1-102, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Provisions similar to section 102 have their genesis in *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 102. The purpose of section 102 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 102. Further, corporations "governed" by

this Act — which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power — are also subject to the reservation of power of section 102 and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 102 is also supported by specific constitutional authorization.

IDAHO REPORTER'S COMMENT

This section, which is substantively identical to previous I.C. § 30-1-149, makes it clear that the Legislature at all times retains the power to amend or repeal the Act or any part of it. Because there are some old, now obsolete cases which held that corporations formed under certain statutes may acquire contractual rights under those statutes, it has become standard practice in modern corporation acts to negate any implications that corporations or shareholders possess any vested rights in existing law. Further, such a section is in effect mandated by Idaho Constitution, Art. XI, § 2, providing, *inter alia,* that " ... the legislature shall provide by general law for the organization of corporations hereafter to be created: provided, that any such general law shall be subject to future repeal or alteration by the legislature."

30-1-103 — 30-1-119. [Reserved.]

30-1-120. Requirements for documents — Extrinsic facts. — (1) A document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing by the secretary of state.

(2) This chapter must require or permit filing the document in the office of the secretary of state.

(3) The document must contain the information required by this chapter. It may contain other information as well.

(4) The document must be typewritten or printed or, if electronically transmitted, it must be in a format that can be retrieved or reproduced in typewritten or printed form.

(5) The document must be in the English language. A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(6) Except as otherwise permitted by section 30-1-1622, Idaho Code, the document must be executed:

(a) By the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(b) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(c) If the corporation is in the hands of a receiver, trustee or other court-appointed fiduciary, by that fiduciary.

(7) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain a corporate seal, attestation, acknowledgment or verification.

(8) If the secretary of state has prescribed a mandatory form for the document under section 30-1-121, Idaho Code, the document must be in or on the prescribed form.

(9) The document must be delivered to the office of the secretary of state for filing. Delivery may be made by electronic transmission if and to the extent permitted by the secretary of state. If it is filed in typewritten or printed form and not transmitted electronically, the secretary of state may require one (1) exact or conformed copy to be delivered with the document.

(10) When the document is delivered to the office of the secretary of state for filing, the correct filing fee, and any other fee or penalty required to be paid therewith by this chapter or other law must be paid or provision for payment made in a manner permitted by the secretary of state.

(11) Whenever a provision of this chapter permits any of the terms of a plan or a filed document to be dependent upon facts objectively ascertainable outside the plan or filed document, the following provisions apply:

(a) The manner in which the facts will operate upon the terms of the plan or filed document shall be set forth in the plan or filed document.

(b) The facts may include, but are not limited to:

(i) Any of the following that are available in a nationally recognized news or information medium either in print or electronically: statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data;

(ii) A determination or action by any person or body, including the corporation or any other party to a plan or filed document; or

(iii) The terms of, or actions taken under, an agreement or document to which the corporation is a party, or any other agreement or document.

(c) As used in this subsection:

(i) "Filed document" means a document filed with the secretary of state under any provision of this chapter except part 15 or section 30-1-1622, Idaho Code; and

(ii) "Plan" means a plan of domestication, merger or share exchange.

(d) The following provisions of a plan or filed document may not be made dependent upon facts outside the plan or filed document:

(i) The name and address of any person required in a filed document;

(ii) The registered office of any entity required in a filed document;

(iii) The registered agent of any entity required in a filed document;

(iv) The number of authorized shares and designation of each class or series of shares;

(v) The effective date of a filed document;

(vi) Any required statement in a filed document of the date on which the underlying transaction was approved or the manner in which that approval was given.

(e) If a provision of a filed document is made dependent upon a fact ascertainable outside of the filed document, and that fact is not ascertainable by reference to a source described in subsection (11)(b)(i) of this section or a document that is a matter of public record, or the affected shareholders have not received notice of the fact from the corporation, then the corporation shall file with the secretary of state articles of amendment setting forth the fact promptly after the time when the fact referred to is first ascertainable or thereafter changes. Articles of amend-

ment under this subsection (11)(e) are deemed to be authorized by the authorization of the original filed document or plan to which they relate and may be filed by the corporation without further action by the board of directors or the shareholders.

History.

I.C., § 30-1-120, as added by 1997, ch. 366, § 2, p. 1080; am. 1998, ch. 222, § 1, p. 764; am. 2004, ch. 324, § 1, p. 907; am. 2007, ch. 314, § 2, p. 887.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2007 amendment, by ch. 314, deleted "except as provided in sections 30-1-503 and 30-1-1509, Idaho Code" from the end in subsection (9).

ABA OFFICIAL COMMENT

Section 120 standardizes the filing requirements for all documents required or permitted by the Model Act to be filed with the secretary of state. In a few instances, other sections of the Act impose additional requirements which must also be complied with if the document in question is to be filed. Section 120 relates only to documents which the Model Act expressly requires or permits to be filed with the secretary of state; it does not authorize or direct the secretary of state to accept or reject for filing other documents relating to corporations and does not treat documents required or permitted to be filed under other statutes.

The purposes of the filing requirements of part 1 are: (1) to simplify the filing requirements by elimination of formal or technical requirements that serve little purpose, (2) to minimize the number of pieces of paper to be processed by the secretary of state, and (3) to eliminate all possible disputes between persons seeking to file documents and the secretary of state as to the legal efficacy of documents.

The requirements of section 120 may be summarized as follows:

1. Form. To be eligible for filing, a document must be typed or printed and in the English language (except to the limited extent permitted by section 120(5)). The secretary of state is not authorized to prescribe forms (except to the extent permitted by section 121) and as a result may not reject documents on the basis of form (see section 125) if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section.

2. Execution. To be filed a document must simply be executed by a corporate officer. Section 121(6). No specific corporate officer is designated as the appropriate officer to sign though the signing officer must designate his office or the capacity in which he signs the document. Among the officers who are expressly authorized to sign a document is the chairman of the board of directors, a choice that may be appropriate if the corporation has a board of directors but has not appointed officers. If a corporation has not been formed or has neither officers nor a board of directors, an incorporator may execute the document.

The requirement in earlier versions of the Model Act and in many state statutes that documents must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with documents filed under corporation statutes. (See in this connection section 129, which makes it a criminal offense for any person to sign a document for filing with knowledge that it contains false information.) On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgments, verifications, or seals; section 121(7) therefore provides that the addition of these forms of execution does not affect the eligibility of the document for filing.

3. Contents. A document must be filed by the secretary of state if it contains the information required by the Model Act. The document may contain additional information or statements and their presence is not ground for the secretary of state to reject the document for filing. These documents must be accepted for filing even though the secretary of state believes that the language is illegal or unenforceable. In view of this very limited discretion granted to the secretaries of state under this section, section 125(4) defines the secretary of state's role as "ministerial" and provides that no inference or presumption arises from the fact that the secretary of state accepted a document for filing. See the Official Comments to sections 125 and 130.

4. Number of copies. Earlier versions of the Model Act required that "duplicate originals" (each being executed as an original document) be submitted with filings made with the secretary of state. This requirement was eliminated from the Model Act and replaced with the requirement that "one exact or conformed copy" accompany the document filed with the secretary of state. The Model Act now permits the secretary of state to require an exact or conformed copy if the document is being filed in typewritten or printed form, providing the secretary of state flexibility to determine whether or not such copies serve any purpose. There is no such requirement with respect to documents transmitted electronically.

Under section 120(9) an "exact" copy is a reproduction of the executed original document; a "conformed" copy is a copy on which the existence of signatures is entered or noted on the copy. The substitution of exact or conformed copies for duplicate originals reflects advances in the art of office copying machines that permit the routine reproduction of exact copies of executed documents. However, a person submitting "duplicate originals" meets any requirement for an exact or conformed copy since the secretary of state may treat the duplicate original as a "conformed copy."

5. Reference to extrinsic facts. Section 120(11) permits any of the terms of a filed document or a plan to be made dependent on facts outside the document or plan with the exceptions provided in section 120(11)(d). Terms of a filed document or plan may be made dependent on a fact outside the control of the corporation. Common examples are references to an interest rate such as the federal funds rate or to securities market prices. Section 120(11)(b) also provides that the facts on which a filed document or plan may be made dependent include facts within the control of the corporation in order to make clear that those facts do not need to occur independently. In addition to a determination or action by the corporation, references to extrinsic facts may also include, without limitation, references to determinations or actions by the board of directors, a committee of the board, an officer, employee or agent of the corporation, or any other person.

The only limitations on referring to extrinsic facts in a filed document or plan are that the facts must be objectively ascertainable and that the filed document or plan must state the manner in which the facts will operate. The purpose of these requirements is to avoid disputes over whether an extrinsic fact has occurred or its effect.

If the terms of a filed document or plan are made dependent on an agreement or other document as authorized by section 120(11)(b)(iii), care should be taken to identify the agreement or document appropriately. The agreement or document must be identified in a manner that satisfies the objectively ascertainable standard, and the manner in which the terms or events under it are to operate must be specified. Consideration should also be given to the intended effects of an amendment to the agreement or document. A simple reference to an agreement will presumably include subsequent amendments, while a reference to the same agreement as in effect on a specified date presumably will not.

Parts 9 and 11 generally require the board of directors to adopt a plan and section 621 requires the board to determine the adequacy of consideration for shares to be issued by the corporation. If the terms of such a plan or share issuance are determined by reference to extrinsic facts, the board should take care to establish appropriately defined parameters for such terms in order to discharge its statutory duties.

Where the terms of a filed document are dependent on extrinsic facts, section 120(11)(e) establishes a procedure that will permit the shareholders to determine what those facts are in the following manner:

1. If the facts are ascertainable by reference to one of the generally available sources of information described in section 120(11)(b)(i), a shareholder may determine the facts by reference to that source.

2. If the facts are set forth in a document of public record, a shareholder may determine the facts by consulting the public record. Documents that are a matter of public record will include, without limitation, filings with the secretary of state under the Act and those filings with the Securities and Exchange Commission that are publicly available either on the EDGAR electronic filing system or in hard copy.

3. If the corporation has provided notice of the facts to those shareholders affected by the provision of the filed document that is dependent on the facts, those shareholders may refer to the notice. Other shareholders will also have access to the notice pursuant to sections 1601(5)(a) and 1602(1).

4. In all other cases, the corporation is required to file articles of amendment when a fact referred to in a filed document is first ascertainable or thereafter changes. To simplify the filing of the articles of amendment, section 120(11)(e) provides that separate approval of the amendment is not required. If there is any doubt as to whether the filing of articles of amendment is necessary, the corporation should err on the side of filing articles of amendment.

IDAHO REPORTER'S COMMENT

Our prior act described the filing requirements for each document to be filed with the secretary of state in the sections dealing with the document, e.g., I.C. §§ 30-1-51 & 55 for articles of incorporation and §§ 30-1-61 & 62 for articles of amendment, and so on. This new § 120 will therefore significantly simplify the substantive sections by centralizing all filing requirements for all documents in a single section and by making unnecessary the existing repetitive description of ministerial details in the substantive sections.

Our prior act generally required filing duplicate originals executed by the president or a vice president and the secretary or an assistant secretary. These filing and execution requirements are greatly simplified by new section 120. The Official Model Act Text has been modified in subsection (4) to provide for electronic filing and in subsection (9) to conform with the current procedures of the secretary of state. A new subsection (10) has also been added to reflect our secretary of state's ongoing practices.

Subsection (11), added in 2004, broadly authorizes reference to extrinsic facts in setting terms in file documents. Good examples include references to interest rates and securities market prices.

30-1-121. Forms. — (1) The secretary of state shall prescribe and furnish on request forms for:

(a) A foreign corporation's application for a certificate of authority, or amended certificate, to transact business in this state;

(b) A foreign corporation's application for a certificate of withdrawal; and

(c) The annual report.

(2) The secretary of state may prescribe and furnish on request forms for other documents required or permitted to be filed by this chapter but their use is not mandatory.

History.

I.C., § 30-1-121, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

As described in the Official Comment to section 120, documents are entitled to filing under the Model Act if they meet the substantive and formal requirements of the Act; they may also contain additional information if the person submitting the document so elects. See the Official Comments to sections 120 and 125. In these circumstances it is not appropriate to vest the secretary of state with general authority to establish mandatory forms for use under the Model Act. Certain types of reports and requests for documents may be processed efficiently only if uniform forms are prescribed by the secretary of state. Processing of large-volume, largely routine filings is expedited if standardized forms are required. Also, the disclosure requirements of the annual report may be administered on a systematic basis if a standardized form is mandated. Section 121(1) recognizes that these considerations may exist in limited cases, and expressly enumerates those forms for which the secretary of state is authorized to establish mandatory forms.

Section 121(2) authorizes (but does not require) the secretary of state to prepare forms suitable for use for other documents required or permitted to be filed under the Act. However, the use of these forms is permissive and cannot be required by the secretary of state.

IDAHO REPORTER'S COMMENT

Previous I.C. § 30-1-142 distinguished between "reports" and "other documents" and required that reports be made on forms prepared and furnished by the secretary of state. Forms for other documents may or may not be provided by the secretary of state, leaving the secretary's office with useful flexibility given funding and staffing realities.

New § 121(2) would extend the permissive approval and not require the secretary of state to provide any forms beyond the particular documents specified in subsection (1).

Subsection (1) has been modified slightly from the Official Model Act Text to reflect current practice in the secretary of state's office.

30-1-122. Filing, service, and copying fees. — (1) The secretary of state shall collect the following fees when the documents described in this subsection are delivered to him for filing:

Document	Fee
(a) Articles of incorporation	$100.00
(b) Application for use of deceptively similar name	$ 20.00
(c) Application for reserved name	$ 20.00
(d) Notice of transfer of reserved name	$ 20.00
(e) Application for registered name	$ 60.00
(f) Application for renewal of registered name	$ 60.00
(g) Amendment of articles of incorporation	$ 30.00
(h) Restatement of articles of incorporation with amendment of articles	$ 30.00
(i) Articles of merger or share exchange	$ 30.00
(j) Articles of dissolution	$ 30.00
(k) Articles of revocation of dissolution	$ 30.00
(*l*) Certificate of administrative dissolution	No fee
(m) Application for reinstatement following administrative dissolution	$ 30.00
(n) Certificate of reinstatement	No fee
(o) Certificate of judicial dissolution	No fee
(p) Application for certificate of authority	$100.00
(q) Application for amended certificate of authority	$ 30.00
(r) Application for certificate of withdrawal	$ 20.00
(s) Certificate of revocation of authority to transact business	No fee
(t) Annual report	No fee
(u) Articles of correction	$ 30.00
(v) Certificate of existence or authorization	$ 10.00
(w) Any other document required or permitted to be filed by this chapter	$ 20.00
(x) Any document when the filing party requires the certificate therefor to be returned within eight (8) working hours, a surcharge of	$ 20.00
(y) Any nontyped document which requires a fee, a surcharge of	$ 20.00

(2) The secretary of state shall collect a fee of ten dollars ($10.00) each time process is served on him under this chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(3) The secretary of state shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign corporation:

(a) Twenty-five cents (25¢) per page for copying; and

(b) Ten dollars ($10.00) for the certificate.

History.

I.C., § 30-1-122, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 3, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted former subsections (1)(g) through (1)(i), which were the listings for the documents "Corporation's statement of change of registered agent or registered office or both," "Agent's statement of change of registered office for each affected corporation," and "Agent's statement of resignation," respectively, and made related redesignations.

ABA OFFICIAL COMMENT

Section 122 establishes in a single section the filing fees for all documents that may be filed under the Model Act. The dollar amount for each document should be inserted by each state as it adopts the Act.

The list of documents in section 122 includes all documents that are authorized to be filed with the secretary of state under the Model Act. The catch-all in subdivision (z) will apply to any document for which a state does not establish a specific filing fee plus any document that later amendments to the statute may authorize or direct be filed with the secretary of state without establishing a specific filing fee.

Subdivision (i) states that no fee is applicable to filing the resignation of a registered agent. This provision permits a person who is named as a registered agent without his consent, or who agrees to serve as registered agent for a fee and the fee is not paid, to eliminate any reference to himself in the records of the secretary of state without expense.

Subdivision (h) states that no fee is applicable to filing a change of address of a registered agent. Since corporation service companies serve as registered agents for thousands of corporations in many jurisdictions, their change of address may require a very large number of filings.

Sections 1107, 1520 and 1531 require the secretary of state to serve process on foreign corporations under the circumstances there specified. The fee for this service is set forth in section 122(2).

Section 122(3) establishes standard fees for copying filed documents and certifying that copies are true copies under section 127.

IDAHO REPORTER'S COMMENT

1. Filing Fees. The new list of documents and fees under §122(1) is somewhat longer than under prior I.C. § 30-1-128 (28 items versus 15 items). This is explained by the new Model Act's introduction of several new forms and elimination of others. For example, subsections (1)(b), (e), (f), (h), (n) through (r) and (v) through (y) are new, while fees for filing the following to - become - obsolete forms are eliminated: A statement of cancellation of shares (would instead be treated as an articles amendment) and a statement of reduction of stated capital (made obsolete by elimination of par value).

2. Fees for Service of Process. New Model Act § 122(2) provides for a process fee when the secretary of state serves as agent for substitute service on a foreign corporation.

3. Fees for Copying. These fees are carried over from old I.C. §30-1-129.

30-1-123. Effective time and date of document. — (1) Except as provided in subsection (2) of this section and section 30-1-124(3), Idaho Code, a document accepted for filing is effective:

(a) At the date and time of filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of filing; or

(b) At the time specified in the document as its effective time on the date it is filed.

(2) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the ninetieth day after the date it is filed.

History.
I.C., § 30-1-123, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 123(1) provides that documents accepted for filing become effective at the time and date of filing, or at another specified time on that date, unless a delayed effective date is selected under section 123(2). This section gives express statutory authority to the common practice of most secretaries of state of ignoring processing time and treating a document as effective as of the date it is submitted for filing even though it may not be reviewed and accepted for filing until several days later.

Section 123(1) requires secretaries of state to maintain means for recording the receipt of documents and provides that documents become effective at the designated time on the date of filing. This provision should eliminate any doubt about situations involving same-day transactions in which documents, for example articles of merger, are filed on the morning of the date the merger is to become effective. Section 123(1) contemplates that the time of filing, as well as the date, will be routinely recorded.

Section 123(2) provides an alternative method of establishing the effective date of a document. The document itself may fix as its effective date any date within 90 days after the date it is filed; it may also fix the time it becomes effective on that date. If no time if specified, the document becomes effective as of the close of business on the specified date. The Model Act also allows the effective date fixed in a document to be corrected to a limited extent. See the Official Comment to section 124.

Section 123(2) does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

IDAHO REPORTER'S COMMENT

New Model Act § 123's specificity with respect to the exact time of filings seems constructive. Our prior act did not address this matter.

The Official Model Act Text is slightly modified in subsection (1)(a) to reflect practice in our secretary of state's office.

30-1-124. Correcting filed document. — (1) A domestic or foreign corporation may correct a document filed by the secretary of state if:

(a) The document contains an inaccuracy; or

(b) The document was defectively executed, attested, sealed, verified or acknowledged; or

(c) The electronic transmission was defective.

(2) A document is corrected:

(a) By preparing articles of correction that:

(i) Describe the document, including its filing date, or attach a copy of it to the articles,

(ii) Specify the inaccuracy or defect to be corrected, and

(iii) Correct the inaccuracy or defect; and

(b) By delivering the articles to the secretary of state for filing.

(3) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

History.
I.C., § 30-1-124, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 124 permits making corrections in filed documents without refiling the entire document or submitting formal articles of amendment. This correction procedure has two advantages: (1) filing articles of correction may be less expensive than refiling the document or filing articles of amendment, and (2) articles of correction do not alter the effective date of the underlying document being corrected. Indeed, under section 124(3), even the correction relates back to the original effective date of the document except as to persons relying on the original document and adversely affected by the correction. As to these persons, the effective date of articles of correction is the date the articles are filed.

A document may be corrected either because it contains an "inaccuracy" or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original document for filing).

A provision in a document setting an effective date (section 123) may be corrected under this section, but the corrected effective date must comply with section 123 measured from the date of the original filing of the document being corrected, i.e. it cannot be before the date of filing of the document or more than 90 days thereafter.

IDAHO REPORTER'S COMMENT

New Model Act § 124's provision for filing corrections seems convenient. Our prior act did not address this matter.

We have used "inaccuracy" in subsections (1)(a) and (2)(a)(ii) and (iii) in lieu of the Official Model Act Text term "incorrect statement." Also, subsection (1)(c) was added to provide for electronic transmission.

30-1-125. Filing duty of secretary of state. — (1) If a document delivered to the office of the secretary of state for filing satisfies the requirements of section 30-1-120, Idaho Code, the secretary of state shall file it.

(2) The secretary of state files a document by recording it as filed on the date and time of receipt. After filing a document, the secretary of state shall deliver to the domestic or foreign corporation or its representative a copy of the document with an acknowledgment of the date and time of filing.

(3) If the secretary of state refuses to file a document, he shall return it to the domestic or foreign corporation or its representative within five (5) days after the document was delivered, together with a brief, written explanation of the reason for his refusal.

(4) The secretary of state's duty to file documents under this section is ministerial. His filing or refusing to file a document does not:

(a) Affect the validity or invalidity of the document in whole or part;

(b) Relate to the correctness or incorrectness of information contained in the document;

(c) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

History.

I.C., § 30-1-125, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 4, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted "except as provided in sections 30-1-503 and 30-1-1509, Idaho Code" following "After filing a document" in the second sentence in subsection (2).

ABA OFFICIAL COMMENT

1. Filing Duty in General. Under section 125 the secretary of state is required to file a document if it "satisfies the requirements of section 120." This language should be contrasted with earlier versions of the Model Act (and many state statutes) that required the secretary of state to ascertain whether the document "conformed with law" before filing it. The purpose of this change is to limit the discretion of the secretary of state to a ministerial role in reviewing the contents of documents. If the document submitted is in the form prescribed and contains the information required by section 120 and the applicable provision of the Model Act, the secretary of state under section 125 must file it even though it contains additional provisions the secretary of state may feel are irrelevant or not authorized by the Model Act or by general legal principles. Consistently with this approach, section 125(4) states that the filing duty of the secretary of state is ministerial and provides that filing a document with the secretary of state does not affect the validity or invalidity of any provision contained in the document and does not create any presumption with respect to any provision. Persons adversely affected by provisions in a document may test their validity in a proceeding appropriate for that purpose. Similarly, the attorney general of the state may also question the validity of provisions of documents filed with the secretary of state in an independent suit brought for that purpose; in neither case should any presumption or inference be drawn about the validity of the provision from the fact that the secretary of state accepted the document for filing.

2. Mechanics of Filing. Section 125(2) provides that when the secretary of state files a document, he records it as filed, retains the signed original document for his records, and returns the exact or conformed copy (which must accompany the document under section 120(9)) to the corporation or its representative with the secretary of state's acknowledgment of receipt. This will establish that a document has been filed in the form of the copy. Consideration was given to dispensing with the document copy entirely and providing only for the return of a fee receipt or equivalent document. Several states currently follow this practice with respect to articles of incorporation and other documents. It was felt to be important, however, to continue a practice by which each corporation receives back from the secretary of state for its records a document that on its face shows that it is an exact or conformed copy of the document that was filed with the secretary of state. This copy is usually placed in the minute book and is available for informal inspection without requiring a person to examine the records of the secretary of state. Of course, a person desiring a certified copy of any filed document may obtain it from the office of the secretary of state by paying the fee prescribed in section 120(3).

3. Elimination of Certificate of Incorporation and Similar Documents. Section 125(2) provides that acceptance of articles of incorporation or other documents is evidenced merely by the issuance of an acknowledgment. Earlier versions of the Model Act and the statutes of many states provided that acceptance by the secretary of state is evidenced by a "certificate" (e.g., of incorporation, or merger, or of amendment). This older practice was not retained in the revised Model Act because it was felt desirable to reduce the number of pieces or paper issued by the secretary of state. Under the older practice most state offices routinely issued both fee receipts and certificates. A single document -- the acknowledgment -- should sufficiently indicate that the document has been accepted for filing, and in fact many states in recent years have dispensed with the formal certificate.

4. Rejection of Document by Secretary of State. Because of the simplification of formal filing requirements and the limited discretion granted to the secretary of state by the Model Act, it is probable that rejection of documents for filing will occur only rarely. Section 125(3) provides that if the secretary of state does reject a document for filing he must return it to the corporation or its representative within five days together with a brief written explanation of his reason for rejection. This rejection may be the basis of judicial review under section 126.

IDAHO REPORTER'S COMMENT

The change from prior law here can best be appreciated by comparing the old filing duty of the secretary of state for a particular document, e.g., articles of incorporation under I.C. § 30-1-55 (if secretary finds they "conform to law") with the duty under the new Model Act § 125(1) ("shall file documents conforming with § 120 formalities"). The idea is to make it clearer that the secretary of state's filing duties are "ministerial" rather than "discretionary." See also new Model Act § 125(4).

New Model Act § 125(2) simplifies and centralizes the actual filing procedures (stamping, receipting, delivering, etc.) which are now instead scattered with the corresponding substantive sections. We have slightly changed the Official Text here to reflect ongoing practices in the secretary of state's office.

New Model Act § 125(3) requires the secretary of state to return any documents which his office refuses to file, together with a brief written explanation of the reason for the rejections. We did not adopt the earlier Model Act's version of this explanation requirement in 1979. The period for return has been reduced from the earlier Model Act's 10 days to 5 days to reflect the more limited discretion of the secretary of state to reject documents for filing, which leads us to § 125's final subsection (4), which emphasizes again that the role of the secretary of state is "ministerial" rather than "discretionary" and specifically sets forth the lack of legal consequences flowing from a decision to file or to refuse to file a document.

30-1-126. Appeal from secretary of state's refusal to file document. — (1) If the secretary of state refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal, within thirty (30) days after the return of the document, to the fourth judicial district court of the county of Ada, state of Idaho. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the secretary of state's explanation of his refusal to file.

(2) The court may summarily order the secretary of state to file the document or take other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

History.
I.C., § 30-1-126, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

1. The Court with Jurisdiction to Hear Appeals from the Secretary of State. The identity of the specific court with jurisdiction to hear appeals from the secretary of state under section 126 must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. It may either be the court located in the capital of the state or the court in the county where the corporation's principal business office is located in the state or, if the corporation does not have a principal office in the state, the court located in the county in which its registered office is located. Other sections of the Model Act also contemplate that the court with jurisdiction over substantive corporate matters will be designated in the statute. See, for example, section 703, relating to the ordering of a shareholders' meeting after the corporation fails to hold such a meeting. It is expected that jurisdiction over litigation with respect to substantive matters will normally be vested in the court in the county of the corporation's principal or registered office. See Official Comment to section 703.

2. "Summary" Orders. In view of the limited discretion of the secretary of state under the Act, a "summary" order appears to be appropriate in section 126. Throughout the Model Act the term "summarily order" or similar language is used where courts are authorized to order action taken and the person charged with taking the original action has little or no discretion. The word "summary" is not used in a technical sense but to refer to a class of cases where the court might appropriately order that action be taken on the face of the pleadings or after an oral hearing but without any need to resolve disputed factual issues.

3. Burden of Proof and Review Standard. The revised Model Act, unlike earlier versions, does not address either the burden of proof or the standard for review in judicial proceedings challenging action of the secretary of state. It is contemplated that these matters will be governed by general principles of judicial review of agency action in each adopting state.

IDAHO REPORTER'S COMMENT

New Model Act § 126 is part of a "package" with § 125(3), above. There was no comparable provision under our prior Idaho statutes.

30-1-127. Evidentiary effect of copy of filed document. — A certif-

icate from the secretary of state delivered with a copy of a document filed by the secretary of state is prima facie evidence that the original document is on file with the secretary of state.

History.
I.C., § 30-1-127, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The secretary of state may be requested to certify that a specific document has been filed with him upon payment of the fees specified in section 122(3). Section 127 provides that the certificate is prima facie evidence only that the original document is on file. The limited effect of the certificate is consistent with the ministerial filing obligation imposed on the secretary of state under the Model Act.

IDAHO REPORTER'S COMMENT

New Model Act § 127 is greatly reduced from prior I.C. § 30-1-141, "parallel" with the significant reduction in the discretion of the secretary of state to refuse to accept documents for filing. In effect, less would be certified to by the secretary of state. Also, we have substituted "prima facie" for the Official Text's "conclusive," again in keeping with the merely ministerial nature of the secretary of state's functions. The certificate from the secretary of state, as well as the copy of the document, may be delivered by electronic transmission.

30-1-128. Certificate of existence. — (1) Anyone may apply to the secretary of state to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(2) A certificate of existence or authorization sets forth:

(a) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state;

(b) That:

(i) The domestic corporation is duly incorporated under the law of this state, and the date of its incorporation, or

(ii) The foreign corporation is authorized to transact business in this state and the date of its certificate of authority; and

(c) Other facts of record in the office of the secretary of state that may be requested by the applicant.

(3) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the secretary of state may be relied upon as prima facie evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state.

History.
I.C., § 30-1-128, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 128 establishes a procedure by which anyone may obtain a conclusive certificate from the secretary of state that a particular domestic or foreign corporation is in existence or is authorized to transact business in the state. The certificate will probably be a standardized form. The secretary of state is to make the judgment whether or not the corporation is in existence or is authorized to transact business from public records only and is not expected to

make a more extensive investigation. In appropriate cases, the secretary of state may issue a certificate subject to specified qualifications.

Section 128(2)(c) refers only to taxes, fees, or penalties collected by the secretary of state or collected by other agencies and reported to the secretary of state. In some states the secretary of state may ascertain from other agencies that franchise or other taxes have been paid and include this information in the certificate. In states where this procedure does not unduly delay the issuance of certificates, section 128 may be revised appropriately. Section 128(2)(c) relates only to taxes, fees, or penalties to the extent their nonpayment affects the existence or authorization to transact business of the corporation.

A certificate of existence or authorization that may be relied on as binding and conclusive is of material assistance to attorneys who may be required to give formal legal opinions in connection with corporate transactions.

IDAHO REPORTER'S COMMENT

New Model Act § 128 formalizes by statute the common practice of issuing "good standing" certificates, which are of significant everyday use in any large scale corporate transactions practice.

The old "good standing" term familiar to corporate practitioners is replaced with the more descriptive terms, "certificate of existence" and "certificate of authorization." The idea is to make it less likely that an unsophisticated individual might be misled.

And again here we have slightly modified the Official Text to conform with the existing Idaho practice in the secretary of state's office.

30-1-129. Penalty for signing false document. — (1) A person commits an offense if he signs a document he knows is false in any material respect with intent that the document be delivered to the secretary of state for filing.

(2) An offense under this section is a misdemeanor punishable by a fine of not to exceed five hundred dollars ($500).

History.

I.C., § 30-1-129, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 129 makes it a criminal offense for any person to sign a document that he knows is false in any material respect with intent that the document be submitted for filing to the secretary of state. As provided in section 140(22A), "sign" includes any manual, facsimile, conformed or electronic signature.

Section 129(2) is keyed to the classification of offenses provided by the Model Penal Code. If a state has not adopted this classification, the dollar amount of the fine should be substituted for the misdemeanor classification.

IDAHO REPORTER'S COMMENT

Our 1979 revisions did not include the precursor to this penalty provision. About 80% of the states have corporation act provisions imposing sanctions against signing false corporate documents. There are variations among these states as to the description of the offense (Delaware, e.g., calls it "perjury" and South Dakota provides for a "civil fine"), the coverage (Delaware covers only the annual franchise tax report, while D.C. does not specify false documents per se but instead makes its a punishable offense to violate any provision of the corporation act) and the "timing" (this Model Act § 129 makes the criminal offense complete when the false document for filing is knowingly signed, while other jurisdictions key the time of the offense to the time of filing).

The Model Act's express knowledge and intent requirements should be noted and should alleviate any concern about mere mistaken filings.

An earlier version of the Model Act provided a $500.00 maximum fine.

30-1-130. Powers of secretary of state. — The secretary of state has the power reasonably necessary to perform the duties required of him by this chapter.

History.

I.C., § 30-1-130, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 130 is intended to grant the secretary of state the authority necessary for his efficient performance of the filing and other duties imposed on him by the Act but is not intended to give him general authority to establish public policy. The most important aspects of a modern corporation statute relate to the creation and maintenance of relationships among persons interested in or involved with a corporation; these relationships basically should be a matter of concern to the parties involved and not subject to regulation or interpretation by the secretary of state. Further, even in situations where it is claimed that the corporation has been formed or is being operated for purposes that may violate the public policies of the state, the secretary of state generally should not be the governmental official that determines the scope of the public policy through administration of his filing responsibilities under the Act. Rather, the attorney general may seek to enjoin the illegal conduct or to dissolve involuntarily the offending corporation.

Section 130 is more narrowly drafted than earlier versions of the Model Act and the statutes of many states.

IDAHO REPORTER'S COMMENT

This is another innocuous provision whose precursor we did not adopt in the 1979 revision. Model Act § 130 is narrowly stated to reflect the overall emphasis on the limited filing responsibilities of the secretary of state. No significant reported case dealing with this matter has been found.

30-1-131 — 30-1-139. [Reserved.]

30-1-140. Chapter definitions. — In this chapter:

(1) "Articles of incorporation" means the original articles of incorporation, all amendments thereof, and any other documents permitted or required to be filed by a domestic business corporation with the secretary of state under any provision of this chapter except section 30-1-1622, Idaho Code. If an amendment of the articles or any document filed under this chapter restates the articles in their entirety, thenceforth the "articles" shall not include any prior documents.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporation," "domestic corporation" or "domestic business corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this chapter.

(5) "Deliver" or "delivery" means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery and electronic transmission.

(6) "Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(7) "Domestic unincorporated entity" means an unincorporated entity whose internal affairs are governed by the laws of this state.

(8) "Effective date of notice" is defined in section 30-1-141, Idaho Code.

(9) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval and reproduction in written form of information by the recipient.

(10) "Eligible entity" means a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation.

(11) "Eligible interests" means interests or memberships.

(12) "Employee" includes an officer but not a director. A director may accept duties that make him also an employee.

(13) "Entity" includes domestic and foreign business corporation; domestic and foreign nonprofit corporation; estate; trust; domestic and foreign unincorporated entity; and state, United States and foreign government.

(14) The phrase "facts objectively ascertainable outside the plan or filed document" is as set forth in section 30-1-120(11), Idaho Code.

(15) "Filing entity" means an unincorporated entity that is of a type that is created by filing a public organic document.

(16) "Foreign corporation" means a corporation incorporated under a law other than the law of this state which would be a business corporation if incorporated under the laws of this state.

(17) "Foreign nonprofit corporation" means a corporation incorporated under a law other than the law of this state, which would be a nonprofit corporation if incorporated under the laws of this state.

(18) "Foreign unincorporated entity" means an unincorporated entity whose internal affairs are governed by an organic law of a jurisdiction other than this state.

(19) "Governmental subdivision" includes authority, county, district and municipality.

(20) "Includes" denotes a partial definition.

(21) "Individual" means a natural person.

(22) "Interest" means either or both of the following rights under the organic law of an unincorporated entity:

(a) The right to receive distributions from the entity either in the ordinary course or upon liquidation; or

(b) The right to receive notice or vote on issues involving its internal affairs, other than as an agent, assignee, proxy or person responsible for managing its business and affairs.

(23) "Interest holder" means a person who holds of record an interest.

(24) "Means" denotes an exhaustive definition.

(25) "Membership" means the right of a member in a domestic or foreign nonprofit corporation.

(26) "Nonfiling entity" means an unincorporated entity that is of a type that is not created by filing a public organic document.

(27) "Nonprofit corporation" or "domestic nonprofit corporation" means a corporation incorporated under the laws of this state and subject to the provisions of the Idaho nonprofit corporation act.

(28) "Notice" is defined in section 30-1-141, Idaho Code.

(29) "Organic document" means a public organic document or a private organic document.

(30) "Organic law" means the statute governing the internal affairs of a domestic or foreign business or nonprofit corporation or unincorporated entity.

(31) "Owner liability" means personal liability for a debt, obligation or liability of a domestic or foreign business or nonprofit corporation or unincorporated entity that is imposed on a person:

(a) Solely by reason of the person's status as a shareholder, member or interest holder; or

(b) By the articles of incorporation, bylaws or an organic document under a provision of the organic law of an entity authorizing the articles of incorporation, bylaws or an organic document to make one (1) or more specified shareholders, members or interest holders liable in their capacity as shareholders, members or interest holders for all or specified debts, obligations or liabilities of the entity.

(32) "Person" includes individual and entity.

(33) "Principal office" means the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(34) "Private organic document" means any document, other than the public organic document, if any, that determines the internal governance of an unincorporated entity. Where a private organic document has been amended or restated, the term means the private organic document as last amended or restated.

(35) "Proceeding" includes civil suit and criminal, administrative and investigatory action.

(36) "Public organic document" means the document, if any, that is filed of public record to create an unincorporated entity. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

(37) "Record date" means the date established under part 6 or 7 of this chapter, on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this chapter. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

(38) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under section 30-1-840(3), Idaho Code, for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(39) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the

extent of the rights granted by a nominee certificate on file with a corporation.

(40) "Shares" means the units into which the proprietary interests in a corporation are divided.

(41) "Sign" or "signature" includes any manual, facsimile, conformed or electronic signature.

(42) "State," when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory and insular possession, and their agencies and governmental subdivisions, of the United States.

(43) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(44) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares, but not "outstanding" shares.

(45) "Unincorporated entity" means an organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name and that is not any of the following: a domestic or foreign business or nonprofit corporation, an estate, a trust, a state, the United States, or a foreign government. The term includes, without limitation, a general partnership, limited liability company, limited partnership, business trust, joint stock association and incorporated nonprofit association.

(46) "United States" includes district, authority, bureau, commission, department and any other agency of the United States.

(47) "Voting group" means all shares of one (1) or more classes or series that under the articles of incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group.

(48) "Voting power" means the current power to vote in the election of directors.

History.

I.C., § 30-1-140, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 2, p. 907.

STATUTORY NOTES

Cross References.

Idaho nonprofit corporation act, § 30-3-1 et seq.

ABA OFFICIAL COMMENT

Section 140 collects in a single section definitions of terms used throughout the Model Act. Parts and sections of the Act in a few instances contain specialized definitions applicable only to those parts or sections.

Most of the definitions of section 140 are drawn directly from earlier versions of the Model Act and are reasonably self-explanatory. A number of definitions, however, are new or deserve further explanation.

1. Conspicuous. "Conspicuous" is defined in section 140(3) basically as defined in section 1-201(10) of the UNIFORM COMMERCIAL CODE. Even though the definition indicates some of the methods by which a provision may be made attention-calling, the test is whether attention can reasonably be expected to be called to it.

2. Corporation, Domestic Corporation, Domestic Business Corporation, Foreign Corporation and Foreign Business Corporation. "Corporation," "domestic corporation," "domestic business corporation," "foreign corporation" and "foreign business corporation" are defined in sections 140(4) and (10). The word "corporation," when used alone, refers only to domestic corporations. In a few instances, the phrase "domestic corporation" has been used in order to contrast it with a foreign corporation. The phrase "domestic business corporation" has been used on occasion to contrast it with a domestic nonprofit corporation.

3. Distribution. The term "distribution" defined in section 140(6) is a fundamental element of the financial provisions of the Model Act as amended in 1980. Section 640 sets forth a single, unitary test for the validity of any "distribution." Section 140(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus a "distribution" includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness in connection with a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

4. Electronic Transmission. "Electronic transmission" or "electronically transmitted" includes both communication systems which in the normal course produce paper, such as telegrams and facsimiles, as well as communication systems which transmit and permit the retention of data which is then subject to subsequent retrieval and reproduction in written form. Electronic transmission is intended to be broadly construed and include the evolving methods of electronic delivery, including electronic transmissions between computers via modern, as well as data stored and delivered on magnetic tapes or computer diskettes. The phrase is not intended to include voice mail and other similar systems which do not automatically provide for the retrieval of data in printed or typewritten form.

5. Entity. The term "entity," defined in section 140(9), appears in the definition of "person" in section 140(16) and is included to cover all types of artificial persons. Estates and trusts and general partnerships are included even though they may not, in some jurisdictions, be considered artificial persons. "Trust," by itself, means a non-business trust, such as a traditional testamentary or inter vivos trust.

The term "entity" is broader than the term "unincorporated entity" which is defined in section 140(24A). See also the definitions of "governmental subdivision" in section 140(11), "state" in section 140(23), and "United States" in section 140(25).

A form of co-ownership of property or sharing of returns from property that is not a partnership under the Uniform Partnership Act (1997) will not be an "unincorporated entity." In that connection, Section 202(c) of the Uniform Partnership Act (1997) [I.C. § 53-3-202(c)] provides, among other things, that:

In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

5.1. Membership. "Membership" is defined in section 140(14A) for purposes of this Act to refer only to the rights of a member in a nonprofit corporation. Although the owners of a limited liability company are generally referred to as "members," for purposes of this Act they are referred to as "interest holders" and what they own in the limited liability company is referred to in this Act as an "interest."

5.2. Organic Documents, Public Organic Documents And Private Organic Documents. The term "organic documents" in section 140(15A) includes both public organic documents and private organic documents. The term "public organic document" includes such documents as the certificate of limited partnership of a limited partnership, the articles of organization or certificate of formation of a limited liability company, the deed of trust of a business trust and comparable documents, however denominated, that are publicly filed to create other types of unincorporated entities. An election of limited liability partnership status is not of itself a public organic document because it does not create the underlying general or limited partnership filing the election, although the election may be made part of the public organic document of the partnership by its organic law. The term "private organic document" includes such documents as a partnership agreement of a general or limited partnership, an operating agreement of a limited liability company and comparable documents, however denominated, of unincorporated types of other entities.

5.3. Owner Liability. The term "owner liability" is used in the context of provisions in Parts 9 and 11 that preserve the personal liability of shareholders, members and interest holders when the entity in which they hold shares, memberships or interests is the subject of a transaction under those parts. The term includes only liabilities that are imposed pursuant to statute on shareholders, members or interest holders. Liabilities that a shareholder, member or interest holder incurs by contract are not included. Thus, for example, if a state's business corporation law were to make shareholders personally liable for unpaid wages, that liability would be an "owner liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "owner liability." The reason for excluding contractual liabilities from the definition of "owner liability" is because those liabilities are constitutionally protected from impairment and thus do not need to be separately protected in Parts 9 and 11.

5.4 Unincorporated Entity. The term "unincorporated entity" is a subset of the broader term "entity."

There is some question as to whether a partnership subject to the Uniform Partnership Act (1914) is an entity or merely an aggregation of its partners. That question has been resolved by Section 201 of the Uniform Partnership Act (1997)(I.C. §53-3-201), which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of the Uniform Partnership Act (1914) gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an "unincorporated entity." As a result, all general partnerships will be "unincorporated entities" regardless of whether the state in which they are organized has adopted the new Uniform Partnership Act (1997)(I.C. §§53-3-101 through 53-3-1205).

The term "unincorporated entity" includes limited liability partnerships and limited liability limited partnerships because those entities are forms of general partnerships and limited partnerships, respectively, that have made the additional required election claiming that status.

Section 4 of the Uniform Unincorporated Nonprofit Association Act (I.C. §53-704) gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an "unincorporated entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the Uniform Act have nonetheless modified the common law rule, but states that have not adopted the Uniform Act should analyze whether they should modify the definition of "unincorporated entity" to add an express reference to unincorporated nonprofit associations.

"Business trust" includes any trust carrying on a business, such as a Massachusetts trust, real estate investment trust, or other common law or statutory business trust. The term "unincorporated entity" expressly excludes estates and trusts (i.e., trusts that are not business trusts), whether or not they would be considered artificial persons under the governing jurisdiction's law, to make it clear that they are not eligible to participate in a conversion under part 9 or a merger or share exchange under part 11.

6. Principal Office. Section 140(17) defines the principal office of a corporation to be the office within or without the state, where the principal executive office of the corporation is located. Many corporations maintain numerous offices, but there is usually one office, some-times colloquially referred to as the home office, headquarters, or executive suite, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by section 1621. In case of doubt as to which corporate office is the principal office, the designation by the corporation in its annual report should be accepted as establishing the principal office of the corporation.

7. Shareholder. The definition of "shareholder" in section 140(21) includes a beneficial owner of shares named in a nominee certificate under section 723, but only to the extent of the

rights granted the beneficial owner in the certificate-for example, the right to receive notice of, and vote at, shareholders' meetings. Various substantive sections of the Model Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under section 723) to exercise some of the rights of a "shareholder." See, for example, section 740 (derivative proceedings).

8. Secretary. The term "secretary" is defined in section 140(20) since the Model Act does not require the corporation to maintain any specific or titled officers. See section 840. However, some corporate officer, however titled, must perform the functions described in this definition, and that officer is referred to as the "secretary" in various sections of the Act that impose a duty on him.

9. Sign. The definition of "sign" or "signature" includes manual, facsimile, conformed or electronic signatures. In this regard, it is intended that any manifestation of an intention to execute or authenticate a document will be accepted. Electronic signatures are expected to encompass any methodology approved by the secretary of state for purposes of verification of the authenticity of the document. This could include a typewritten conformed signature or other electronic entry in the form of a computer data compilation of any characters or series of characters comprising a name intended to evidence authorization and execution of a document.

10. Person. The term "person" is defined in section 140(16) to include an individual or an entity. In the case of an individual the Model Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

11. Voting Group. Section 140(26) defines "voting group" for purposes of the Act as a matter of convenient reference. A "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of incorporation or this Act are for that purpose a single voting group. The word "generally" signifies all shares entitled to vote on the matter by the articles of incorporation or this Act that do not expressly have the right to be counted or tabulated separately. "Voting groups" are thus the basic units of collective voting at a shareholders' meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this Act. In a few instances under the Model Act, the board of directors may establish the right to vote by voting groups. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 725. See section 726(1). If a second class of shares is also entitled to vote on the matter, then a further determination must be made as to whether that class is to vote as a separate voting group or whether it is to vote along with the other voting shares as part of a single voting group.

Members of the board of directors are usually elected by a single voting group of shares entitled to vote generally; in some circumstances, however, some members of the board may be selected by one voting group and other members by one or more different voting groups. See section 803.

The definition of a voting group permits the establishment by statute of quorum and voting requirements for a variety of matters considered at shareholders' meetings in corporations with multiple classes of shares. See sections 725 and 726. Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all.

12. Voting Power. Under section 140(27) the term "voting power" means the current power to vote in the election of directors. Application of this definition turns on whether the relevant shares carry the power to vote in the election of directors as of the time for voting on the relevant transaction. If shares carry the power to vote in the election of directors only under a certain contingency, as is often the case with preferred stock, the shares would not carry voting power within the meaning of section 140(27) unless the contingency has occurred, and only during the period when the voting rights are in effect. Shares that carry the power to vote for any directors as of the time to vote on the relevant transaction have the current power to vote in the election of directors within the meaning of section 140(27) even if the shares do not carry the power to vote for all directors.

IDAHO REPORTER'S COMMENT

Section 140 is a collection in one place of definitions of terms used throughout the chapter. The 2004 amendments added nineteen (19) new definitions, deleted one (1) and modified six (6).

Most of the new definitions are related to a new part 9 on "domestication" and a significantly amended part 11 on "mergers and share exchanges."

Of the 47 defined terms in Model Act §140, 8 are taken almost directly from the earlier Model Act section which we adopted almost verbatim in 1979: "corporation" (or "domestic corporation"), "foreign corporation," "articles of incorporation," "shares," "authorized shares," "shareholder," "subscriber" and "employee" are all taken almost verbatim from section 2 of the earlier model act (prior I.C. §30-1-2). These definitions seem sufficiently self-explanatory to need no further comment.

A majority of the 47 defined terms in Model Act §140 were not defined in old, pre-1997 section 2. Many of these seem self-explanatory. A few of the defined terms warrant a separate comment.

The definition of "distribution" is a key part of the 1997 financial and accounting conceptual amendments relating to the elimination of par value and "legal capital" in Part 6.

The definition of "individual" is designed to assure that rights of individuals succeed to the benefit of their estates where appropriate.

The definition of the "proceeding" is taken from the 1980 amendments to the model indemnification section (1987 in Idaho - prior I.C. §30-1-5).

The definition of "record date" specifies a precise time, not just the calendar date, for shareholder determinations.

The definition of "secretary" is designed to make it clear that somebody has to perform the functions set forth. The definition does not purport to define the various functions of a corporation's secretary.

The definition of "voting group" is part of a systematic change in the voting provisions in Part 7.

Eliminated definitions from the pre-1997 act include "net assets," "stated capital," "surplus," "earned surplus," "capital surplus," and "insolvent." These were all removed as part of the 1997 financial changes referred to above which are addressed in connection with Part 6.

With respect to the definition of "voting power" in subsection (27), added in 2004, under prior law the rules governing the shareholder voting process differed slightly from transaction to transaction (e.g., mergers, certain transfers of assets, share exchanges, amendments to the articles of incorporation, and share issuances in other transaction). Subsection (27) is just one small part of a package of changes made in 2004 with a view to harmonizing previously slightly disparate voting rights of shareholders that may apply to corporate transactions that have essentially the same financial or other fundamental effect on the corporation or its shareholders. The package as a whole is a comprehensive set of provisions designed to bring most transactions having a similar effect into alignment.

30-1-141. Notice. — (1) Notice under this chapter must be in writing unless oral notice is reasonable under the circumstances. Notice by electronic transmission is written notice.

(2) Notice may be communicated in person; by mail or other method of delivery; or by telephone, voice mail or other electronic means. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published, or by radio, television, or other form of public broadcast communication.

(3) Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective:

(a) Upon deposit in the United States mail, if mailed postpaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders; or

(b) When electronically transmitted to the shareholder in a manner authorized by the shareholders.

(4) Written notice to a domestic or foreign corporation, authorized to transact business in this state, may be addressed to its registered agent or to the corporation or its secretary at its correspondence address shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(5) Except as provided in subsection (3) of this section, written notice, if in a comprehensible form, is effective at the earliest of the following:

(a) When received;

(b) Five (5) days after its deposit in the United States mail, if mailed postpaid and correctly addressed;

(c) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(6) Oral notice is effective when communicated if communicated in a comprehensible manner.

(7) If this chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this chapter, those requirements govern.

History.

I.C., § 30-1-141, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 5, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted "at its registered office" following "registered agent" in subsection (4).

ABA OFFICIAL COMMENT

Section 141 establishes rules for determining how notice may be given and when notice is effective for a variety of purposes under the Model Act.

1. Notice by a Corporation to its Shareholders. Section 141(3) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient postage. The correct address for this purpose is the address shown in the corporation's records. Written notice includes notice by electronic transmission, but notice may be provided through electronic transmission only if specifically authorized by the shareholder. This allows corporations to provide notices by electronic means, but only when, and in the manner, authorized by the shareholder. Absent such authorization, notice must be provided to the shareholder in the traditional manner consistent with the other provisions of section 141.

Written notice to shareholders by persons other than the corporation is effective as provided in section 141(5). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder is effective when received under section 141(5).

2. Notice to the Corporation. Section 141(4) provides that notice to a corporation may be addressed to the registered agent of the corporation at its registered office or to the corporation or its secretary at the principal office of the corporation. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office as shown in its most recent public filing. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (section 1321), notice of a demand to inspect books and records (section 1602), and notices of resignation (sections 807 and 843). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or if they wish, to the corporation or its secretary at its principal office.

3. Miscellaneous Provisions. Section 141 also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice on some occasions may be given orally if that is reasonable under the circumstances, which would include oral notice through voice mail or other similar means. It also deals with situations where notice may be sought to be given to persons for whom no current address is available, or where personal notice is

impractical. Notice delivered to the person's last known address is effective as described in section 141(5) even though never actually received by the person. Section 141(2) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Section 141(7) recognizes that other sections of the Act prescribe specific notice requirements for particular situations -- e.g., service of process on a corporation's registered agent under section 504 -- and that these specific requirements, rather than the general requirements of section 141, control. Finally, the second sentence of subsection 141(7) permits a corporation's articles of incorporation or bylaws to prescribe the corporation's own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in section 141 permit many other sections of the Model Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.

IDAHO REPORTER'S COMMENT

Like all jurisdictions, our prior act provided for notice in particular contexts, e.g., I.C. § 30-1-29 for shareholders' meetings and § 30-1-43 for directors' meetings, and the details for giving notice were separately laid out in each such section. This new Model Act section § 141 achieves simplification of the various substantive details in a single section.

Subsection (1) adds to the Official Text by providing that electronic transmission of notice constitutes "written notice."

We have also slightly amended the subsection (2) language to provide, e.g., for "voice mail."

Subsection (3) is modified both for specificity in the case of mail notice and to include electronic notice.

Part 2. Incorporation

30-1-201. Incorporators. — One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

History.

I.C., § 30-1-201, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The only functions of incorporators under the Model Act are (1) to sign the articles of incorporation, (2) to deliver them for filing with the secretary of state, and (3) to complete the formation of the corporation to the extent set forth in section 205. One or more "persons" may serve as incorporator; "person" is defined in section 140 to include both individuals and entities; "entity" is also defined in that section to include corporations, limited liability companies, unincorporated associations, partnerships, trusts, estates, and governments.

The Model Act also simplifies the formalities of execution and filing. The requirement in earlier versions of the Model Act and in many state statutes that articles be acknowledged or verified has been eliminated. Also, the requirement that "duplicate originals" (each being executed as an original document) be submitted has been replaced with the requirement that a signed original and an "exact or conformed" copy be submitted. See the Official Comment to section 120.

IDAHO REPORTER'S COMMENT

This new Model Act § 201 is shorter than prior I.C. § 30-1-53 in two non-substantive respects. First, since "persons" includes entities as well as individuals, separate reference to corporations as possible incorporators is dropped. Second, "duplicate originals" will no longer be required under the simplified and centralized filing requirements of new section 120.

30-1-202. Articles of incorporation. — (1) The articles of incorporation must set forth:

(a) A corporate name for the corporation that satisfies the requirements of section 30-1-401, Idaho Code;
(b) The number of shares the corporation is authorized to issue;
(c) The information required by section 30-405(1), Idaho Code; and
(d) The name and address of each incorporator.
(2) The articles of incorporation may set forth:
(a) The names and addresses of the individuals who are to serve as the initial directors;
(b) Provisions not inconsistent with law regarding:
(i) The purpose or purposes for which the corporation is organized,
(ii) Managing the business and regulating the affairs of the corporation,
(iii) Defining, limiting and regulating the powers of the corporation, its board of directors, and shareholders,
(iv) A par value for authorized shares or classes of shares,
(v) The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions;
(c) Any provision that under this chapter is required or permitted to be set forth in the bylaws;
(d) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for:
(i) The amount of a financial benefit received by a director to which he is not entitled,
(ii) An intentional infliction of harm on the corporation or the shareholders,
(iii) A violation of section 30-1-833, Idaho Code, or
(iv) An intentional violation of criminal law; and
(e) A provision permitting or making obligatory indemnification of a director for liability, as defined in section 30-1-850(5), Idaho Code, to any person for any action taken, or any failure to take any action, as a director, except liability for:
(i) Receipt of a financial benefit to which he is not entitled,
(ii) An intentional infliction of harm on the corporation or its shareholders,
(iii) A violation of section 30-1-833, Idaho Code, or
(iv) An intentional violation of criminal law.
(3) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter.
(4) Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with section 30-1-120(11), Idaho Code.

History.
I.C., § 30-1-202, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 3, p. 907; am. 2007, ch. 314, § 6, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (1)(c), which formerly read: "The street address of the corporation's initial registered office and the name of its initial registered agent at that office"; and updated the section reference in subsection (4).

ABA OFFICIAL COMMENT

1. INTRODUCTION. Section 202(1) sets forth the minimum mandatory requirements for all articles of incorporation while section 202(2) describes optional provisions that may be included. A corporation that is formed solely pursuant to the mandatory requirements will generally have the broadest powers and least restrictions on activities permitted by the Model Act. The Model Act thus permits the creation of a "standard" corporation by a simple and easily prepared one-page document.

No reference is made in section 202(1) either to the period of duration of the corporation or to its purposes. A corporation formed under these provisions will automatically have perpetual duration under section 302(1) unless a special provision is included providing a shorter period. Similarly, a corporation formed without reference to a purpose clause will automatically have the purpose of engaging in any lawful business under section 301(1). The option of providing a narrower purpose clause is also preserved in sections 202(2)(b) and 301, with the effect described in the Official Comment to section 301.

2. REQUIREMENTS. The only information required in the articles of incorporation to form a "standard" corporation is:

(1) The name, which must meet the requirements of part 4 of the Model Act.

(2) The number of shares the corporation is authorized to issue. If a single class of shares is authorized, only the number of shares authorized need be disclosed; if more than one class of shares is authorized, however, both the number of authorized shares of each class and a description of the rights of each class must be included. See the Official Comment to sections 601 and 602. It is unnecessary to specify par value, expected minimum capitalization, or contemplated issue price.

(3) The street address of the corporation's initial registered office and the name of its initial registered agent. A mailing address consisting only of a post office box is not sufficient.

(4) The name and address of each incorporator.

No reference need be made in these "standard" articles to a variety of other matters that are referred to in earlier versions of the Model Act and the statutes of many states. For example, there is no need to refer to preemptive rights. See section 631 and the Official Comment. Generally, no substantive effect should be given to the absence of a specific reference to such matters in section 202 since they are referred to in other sections of the Model Act which usually provide an "opt in" privilege that permits a draftsman to elect special treatment if he so desires. See particularly the list of optional provisions set forth in parts 4 and 5 of this comment.

3. OPTIONAL PROVISIONS. Section 202(2) describes specific options that may be elected by the draftsman and contains general authorization to include other provisions relevant to the authority of the corporation, its officers and board of directors, or to the management of the corporation's internal affairs. These provisions include:

a. Initial directors. Under section 202(2)(a) an election may be made to have the corporation organized by a person or persons other than the incorporators. See the Official Comment to section 203. These persons, described as "initial directors," may be either the permanent directors or interim directors to be replaced by the shareholders after the corporation is organized.

b. Purpose clause. Under section 202(2)(b)(i), the corporation may elect a limited purpose clause or provide for specific purposes without limiting the broad purposes provided in section 301. (Specific purposes may be needed, among other reasons, for qualification in certain domestic and foreign jurisdictions and in order to obtain licenses.)

c. Duration. Nearly every corporation today is formed with perpetual duration, but a corporation may elect a shorter duration under section 202(2)(b)(iii).

d. Par value. While par value is no longer a mandatory statutory concept, section 202(2)(b)(iv) permits the inclusion of optional "par value" provisions with regard to shares. Special provisions may give effect or meaning to "par value" essentially as a matter of contract between the parties. These provisions, whether appearing in the articles or in other documents, have only the effect any permissible contractual provision has in the absence of a prohibition by statute. Provisions in the articles establishing an optional par value may also be of use to

corporations which are to be qualified in foreign jurisdictions in that franchise or other taxes are computed upon the basis of par value.

For a general discussion of the treatment of par value, stated capital, and other historical concepts relating to capitalization, see the Official Comment to section 621.

e. Shareholder liability. The basic tenet of modern corporation law is that shareholders are not liable for the corporation's debts by reason of their status as shareholders. Section 202(2)(b)(v) nevertheless permits a corporation to impose that liability under specified circumstances if that is desirable. If no provision of this type is included shareholders have no liability for corporate debts except to the extent they become liable by reason of their own conduct or acts. See section 622(2).

f. Corporate powers. Section 202(3) makes it unnecessary to set forth any corporate powers in the articles. Section 302 grants every corporation essentially the same power that an individual possesses with respect to his affairs. This grant of power, however, may be considered overbroad for certain corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles.

g. Miscellaneous. Under section 202(2)(b)(ii) and (iii) the draftsman may include any provision not inconsistent with law for "managing the business and regulating the affairs of the corporation" and "defining, limiting, and regulating the powers of the corporation, its board of directors and shareholders." This language is designed to allow the draftsman to place in the articles any number of miscellaneous provisions that he believes sufficiently important to be of public record or subject to amendment only by the processes applicable to amendments of articles of incorporation. Basically, the process of amendment of articles of incorporation requires shareholder approval, while bylaws typically may be amended by the board of directors acting alone, though in some instances the power of directors to amend bylaws is restricted. See sections 1020--1022 and the Official Comments to those sections. Provisions relating to the business or affairs of the corporation that may be included in the articles may be subdivided into three general classes:

(1) Provisions that under the Model Act may be elected only by specific inclusion in the articles of incorporation. A list of these provisions is set forth in part 4 of this comment.

(2) Provisions that under the Model Act may be elected by specific inclusion in either the articles of incorporation or the bylaws, and the draftsman elects to include the provision in the articles. A list of provisions that may be elected in either the bylaws or the articles is set forth in part 5 of this comment.

(3) Other provisions not referred to in the Model Act that the draftsman decides should be included in the articles of incorporation. This includes but is not limited to any provision that the Act requires or permits to be set forth in the bylaws. See section 202(2)(c).

h. Self-dealing transactions. When subsidiaries or corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example, by shifting the burden of proving unfairness or "exonerating" an arrangement from "adverse influences." See *Spiegel v. Beacon Participations Inc.*, 297 Mass. 398, 8 N.E.2d 895 (1937); see generally the Official Comment to section 831.

i. Director liability. Section 202(2)(d) authorizes the inclusion of a provision in the articles of incorporation eliminating or limiting, with certain exceptions, the liability of the directors to the corporation or its shareholders for money damages. This grant of authority to the shareholders is consistent with the more general authorization of section 202(2)(b) for the articles to include a wide range of provisions regulating various matters affecting the corporation, including allocating power between the directors and the shareholders. Developments in the mid-and late 1980s highlighted the need to permit reasonable protection of directors from exposure to personal liability, in addition to indemnification, so that directors would not be discouraged from fully and freely carrying out their duties, including responsible entrepreneurial risk-taking. These developments included increased costs and reduced availability of director and officer liability insurance, the decision of the Delaware Supreme Court in *Smith v. Van Gorkom*, 488 A.2d 858 (1985), and the resulting reluctance of qualified individuals to serve as directors.

So long as any such liability-limitation provision does not extend to liability to third parties, shareholders should be permitted--except when important societal values are at stake--to decide how to allocate the economic risk of the directors' conduct between the corporation and the directors. Shareholders of one corporation may view the issue substantially differently than shareholders of another corporation. Accordingly, section 202(2)(d) is optional rather than self-executing. In addition, it follows the path of virtually all the states that have adopted charter option statutes and is applicable only to money damages and not to equitable relief.

Likewise, nothing in section 202(2)(d) in any way affects the right of the shareholders to remove directors, under section 808(1), with or without cause.

The language "any action taken, or any failure to take any action, as a director" parallels section 830(4). It is recognized that in the case of individuals who are both directors and officers it will often not be clear in which capacity the individual is acting. The phrase "as a director" emphasizes that section 202(2)(d) applies to a director's actions or failures to take action in his capacity as a director and not in any other capacity, such as officer, employee, or controlling shareholder. However, it is not intended to exclude coverage of conduct by individuals, even though they are officers, when they are acting in their capacity as directors.

Because adoption of a liability-limitation provision is left to the decision of the shareholders, they are given considerable latitude in the extent to which they are permitted to limit directors' liability. Accordingly, the exceptions to the statute are few and narrow. As important as validating the shareholders' right to determine for themselves the extent of the directors' liability is stating the limits of this right in terms promoting a clear understanding of the conduct which is and which is not included in the limitation of liability. Terms such as "duty of loyalty, ... good faith, ... bad faith," and "recklessness" seem no more precise than (and therefore as potentially expansive as) "gross negligence." All of these formulations are characterizations of conduct rather than definitions of it. Characterizations by nature tend to be more elastic than definitions.

Directors should be afforded reasonable predictability; they are entitled to know whether a contemplated course of action will result in personal liability for money damages. Limits on their exculpation from liability are appropriate but should be expressed in terms that minimize the opportunity for after-the-fact second-guessing.

The language of the exceptions to section 202(2)(d) is intended to express the parameters of the shareholders' right to limit the directors' liability in terms that will promote predictability. First, some types of improper conduct are so clearly without any societal benefit that the law should not appear to endorse such conduct, especially in the case of a state-created entity such as a corporation. Second, any liability limitation will be prospective and, therefore, by definition, the shareholders will not be able to know in advance the exact nature or extent of any claims that they may be giving up. Third, the public has an interest in encouraging good corporate governance. While the exceptions to the shareholders' right to limit liability are few and narrow, they validate important standards of conduct. Finally, in many cases, there will be shareholders who do not vote in favor of the liability limitation. For these shareholders, there should be an irreducible core of protection, especially in view of the fact that in some cases the votes of the directors themselves as shareholders may be sufficient to approve adoption of the provision.

Financial Benefit. Permitting limitation of the liability of a director for receipt of a financial benefit to which the director is not entitled would validate conduct in which the director could realize a personal gain. Corporate law has long subjected transactions from which a director could benefit personally to special scrutiny. The exception is limited, however, to the amount of the benefit actually received. Thus, liability for punitive damages could be eliminated. However, punitive damages are not eliminated in either the exception for infliction of harm or for violation of criminal law and, thus, in a particular case (for example, theft), punitive damages may be available. The benefit must be financial rather than in less easily measurable and more conjectural forms, such as business goodwill, personal reputation, or social ingratiation. The phrase "received by a director" is not intended to be a "bright line." As a director's conduct moves toward the edge of what may be exculpated, he should bear the risk of miscalculation. Depending upon the circumstances, a director may be deemed to have received a benefit that he caused to be directed to another person, for example, a relative, friend, or affiliate.

What constitutes a financial benefit "to which [the director] is not entitled" is left to judicial development. For example, a director is clearly entitled to reasonable compensation for the performance of services or to an increase in the value of stock or stock options held by him; just as clearly, a director is not entitled to a bribe, a kick-back, or the profits from a corporate opportunity improperly taken by the director.

Intentional Infliction Of Harm. There may be situations in which a director intentionally causes harm to the corporation even though he does not receive any improper benefit. The use of the word "intentional," rather than a less precise term such as "knowing," is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act, will cause harm, rather than a general intent to perform the acts which cause the harm. No public policy should permit the shareholders to eliminate or limit the liability of directors for conduct intended to cause harm to the corporation.

Unlawful Distributions. Section 833(1) indicates a strong policy in favor of liability for unlawful distributions approved by directors who have not complied with the standards of

conduct of section 830. Many states have similar provisions, which originated, along with other legal capital statutes, out of a concern for creditors. Accordingly, the exception prohibits the shareholders from eliminating or limiting the liability of directors for a violation of section 833.

Intentional Violation Of Criminal Law. Historically, the criminal law has represented society's statement of the conduct that it most emphatically rejects. Accordingly, even though a director committing a crime may intend to benefit the corporation, the shareholders should not be permitted to exculpate him for any harm caused by his crime, including, for example, fines and legal expenses of the corporation in defending a criminal prosecution. The use of the word "intentional," rather than a less precise term such as "knowing," is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act, constitutes a violation of criminal law.

In order to recover for conduct included within any of the exceptions, the plaintiff will continue to be required to establish causation, damages, and other elements imposed by applicable law.

An amendment authorized by section 202(2)(d) will become effective in the manner provided by section 123 generally for amendments to the articles of incorporation. In addition, in accordance with section 1009, an amendment under section 202(2)(d) will not affect a cause of action existing in favor of the corporation against any directors at the effective time of the amendment.

j. Indemnification. Section 202(2)(e) permits a corporation to include in its articles of incorporation a provision authorizing permissible or mandatory indemnification of a director in accordance with section 851(1)(b). Section 202(2)(e) specifically excepts liability arising out of improper financial benefit received by a director, an intentional infliction of harm on the corporation or the shareholders, an unlawful distribution or an intentional violation of criminal law. These excepted liabilities parallel those a corporation is not permitted to limit or eliminate under section 202 (2)(d). See "Director liability," above. Officers are not included in the language of section 202(2)(e) because, as provided in section 856, mandatory indemnification of officers does not require a provision in the articles of incorporation.

4. OPTIONS IN MODEL ACT THAT MAY BE ELECTED ONLY IN THE ARTICLES OF INCORPORATION.

a. Options with respect to directors. (1) Board of directors may be dispensed with entirely in limited circumstances or its functions may be restricted, § 801.

(2) Power to compensate directors may be restricted or eliminated, § 811.

(3) Election of directors by cumulative voting may be authorized, § 728.

(4) Election of directors by greater than plurality of vote may be authorized, § 728.

(5) Directors may be elected by classes of shares, § 804.

(6) Power to remove directors without cause may be restricted or eliminated, § 808.

(7) Terms of directors may be staggered so that all directors are not elected in the same year, § 806.

(8) Power to fill vacancies may be limited to the shareholders, § 810.

(9) Power to indemnify directors and officers may be limited, § 858.

b. Options with respect to shareholders. (1) Special voting groups of shareholders may be authorized, § 725.

(2) Quorum for voting groups of shareholders may be increased or reduced, §§ 725, 726 and 727.

(3) Quorum for voting by voting groups of shareholders may be prescribed, see § 726.

(4) Greater than majority vote may be required for action by voting groups of shareholders, § 727, see also § 1021.

c. Options with respect to shares. (1) Shares may be divided into classes and classes into series, §§ 601 and 602.

(2) Cumulative voting for directors may be permitted, § 728.

(3) Distributions may be restricted, § 640.

(4) Share dividends may be restricted, § 623.

(5) Voting rights of classes of shares may be limited or denied, § 601.

(6) Classes of shares may be given more or less than one vote per share, § 721.

(7) Terms of a class may vary among holders of the same class, so long as such variations are expressly set forth in the articles, § 601(5).

(8) The board may allocate authorized but unissued shares of a class to another class or series without shareholder approval, § 602.

(9) Shares may be redeemed at the option of the corporation or the shareholder, § 601.

(10) Reissue of redeemed shares may be prohibited, § 631.

(11) Shareholders may be given preemptive rights to acquire unissued shares, § 630.

(12) Redemption preferences may be ignored in determining lawfulness of distributions, § 640.

5. OPTIONS IN MODEL ACT THAT MAY BE ELECTED EITHER IN THE ARTICLES OF INCORPORATION OR IN THE BYLAWS.

a. Options with respect to directors. (1) Number of directors may be fixed or changed within limits, § 803.

(2) Qualifications for directors may be prescribed, § 802.

(3) Notice of regular or special meetings of board of directors may be prescribed, § 822.

(4) Power of board of directors to act without meeting may be restricted, § 821.

(5) Quorum for meeting of board of directors may be increased or decreased (down to one-third) from majority, § 824.

(6) Action at meeting of board of directors may require a greater than majority vote, § 824.

(7) Power of directors to participate in meeting without being physically present may be prohibited, § 820.

(8) Board of directors may create committees and specify their powers, § 825.

(9) Power of board of directors to amend bylaws may be restricted, §§ 1020 and 1022.

b. Options with respect to shares. (1) Shares may be issued without certificates, § 626.

(2) Procedure for treating beneficial owner of street name shares as record owner may be prescribed, § 723.

(3) Transfer of shares may be restricted, § 627.

IDAHO REPORTER'S COMMENT

The long term trend toward simplification of the disclosure requirements in articles for public filing is continued in the new Model Act. New section 202 is shorter than prior I.C. § 30-1-54 due both to the elimination of surplusage and redundancy and to substantive change. Since the Idaho section was amended in 1987 and 1995, however, the changes here are not terribly dramatic. The basic organizational structure of the statute, e.g., remains the same: The first subsection lays out the mandatory provisions, the second lists optional provisions and the third provides that the articles need not address the matter of corporate powers.

The lengthy ABA Official Comment here should be especially useful to those drafting articles of incorporation and also to the judiciary in any cases calling for construction, application or interpretation of what has been drafted.

30-1-203. Incorporation. — (1) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(2) The secretary of state's filing of the articles of incorporation is prima facie proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

History.

I.C., § 30-1-203, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 203(1) provides that the existence of a corporation begins when the articles of incorporation are filed, unless a delayed effective date is specified under section 123. Part 1 contains detailed rules for the filing and effective dates of documents, all of which are applicable to articles of incorporation and other documents. These filing rules simplify the process of creating a corporation in several respects.

1. WHAT TO FILE. Section 120 requires that only one executed original and an exact or conformed copy of the articles need be delivered to the secretary of state for filing. This delivery must be accompanied by the applicable filing fee.

2. NATURE OF FILING. Section 125 provides that the secretary of state files the articles by stamping them 'filed' and recording the date and time of receipt; he then retains the signed original articles of incorporation for his records and returns the exact or conformed copy to the incorporators along with a receipt for the fee. The return of this copy and the fee receipt establishes that the articles have been filed in the form of the copy.

3. CERTIFICATE OF INCORPORATION ELIMINATED. Section 125 provides that

approval by the secretary of state is in the form of return of the copy of the articles with a fee receipt rather than a certificate of incorporation, as was the older practice still followed in many states. See the Official Comment to section 125.

4. PRECISE TIME OF INCORPORATION. Section 203(1) ties the precise time of incorporation to the date and time stamped on the articles. Section 123 provides in turn that this is the date and time the articles are received by the secretary of state; in other words, consistent with the practice of many secretaries of state, processing time is ignored and the date and time of receipt of the articles are the date and time of incorporation. The creators of the corporation may, however, specify that the corporation's existence will begin on a later date than the date of filing, and at a precise time on such a date, to the extent permitted by section 123.

5. CONCLUSIVENESS OF SECRETARY OF STATE'S ACTION ON QUESTION OF INDIVIDUAL LIABILITY FOR CORPORATE ACTIONS. Under section 203(2) the filing of the articles of incorporation as evidenced by return of the stamped copy of the articles with the fee receipt is prima facie proof that all conditions precedent to incorporation have been met, except in proceedings brought by the state. Thus the filing of the articles of incorporation is determinative as to the existence of limited liability for persons who enter into transactions on behalf of the corporation. If articles of incorporation have not been filed, section 204 generally imposes personal liability on all persons who prematurely act as or on behalf of a 'corporation' knowing that articles have not been filed. Section 204 may protect some of these persons to a limited extent, however; see the Official Comment to that section.

IDAHO REPORTER'S COMMENT

Here, by way of comparison to our prior I.C. § 30-1-55, we can start to see the efficiency of new Model Act § 120's centralized filing provisions. The only other change of any note would seem to be the specific reference to "a delayed effective date."

In subsection (2) we substituted "prima facie" for the ABA Official Text's "conclusive" to yet again emphasize the ministerial nature of the secretary of state's functions.

30-1-204. Liability for preincorporation transactions. — All persons purporting to act as or on behalf of a corporation, when there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting.

History.

I.C., § 30-1-204, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Earlier versions of the Model Act, and the statutes of many states, have long provided that corporate existence begins only with the acceptance of articles of incorporation by the secretary of state. Many states also have statutes that provide expressly that those who prematurely act as or on behalf of a corporation are personally liable on all transactions entered into or liabilities incurred before incorporation. [NOTE: New Idaho § 30-1-204 retains such express provision.] A review of recent case law indicates, however, that even in states with such statutes courts have continued to rely on common law concepts of de facto corporations, de jure corporations, and corporations by estoppel that provide uncertain protection against liability for preincorporation transactions. These cases caused a review of the underlying policies represented in earlier versions of the Model Act and the adoption of a slightly more flexible or relaxed standard. [NOTE: New Idaho § 30-1-204 does not adopt the "slightly more flexible or relaxed standard" referred to here for the ABA Official Text version.]

Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability. [NOTE: This argument is accepted in new Idaho § 30-1-204.] A number of situations have arisen, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by modern statutes has not been completed. [NOTE: This argument is not accepted in new Idaho § 30-1-204.]

(1) The strongest factual pattern for immunizing participants from personal liability occurs in cases in which the participant honestly and reasonably but erroneously believed the articles

had been filed. In Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 33 (1964), for example, the defendant had been shown executed articles of incorporation some months earlier before he invested in the corporation and became an officer and director. He was also told by the corporation's attorney that the articles had been filed, but in fact they had not been filed because of a mix-up in the attorney's office. The defendant was held not liable on the "corporate" obligation.

(2) Another class of cases, which is less compelling but in which the participants sometimes have escaped personal liability, involves the defendant who mails in articles of incorporation and then enters into a transaction in the corporate name; the letter is either delayed or the secretary of state's office refuses to file the articles after receiving them or returns them for correction. E.g., Cantor v. Sunshine Greenery, Inc., 165 N.J. Super. 411, 398 A.2d 571 (1979). Many state filing agencies adopt the practice of treating the date of receipt as the date of issuance of the certificate even though delays and the review process may result in the certificate being backdated. The finding of nonliability in cases of this second type can be considered an extension of this principle by treating the date of original mailing or original filing as the date of incorporation.

(3) A third class of cases in which the participants sometimes have escaped personal liability involves situations where the third person has urged immediate execution of the contract in the corporate name even though he knows that the other party has not taken any steps toward incorporating. E.g., Quaker Hill, Inc. v. Parr, 148 Colo. 45, 364 P.2d 1056 (1961).

(4) In another class of cases the defendant has represented that a corporation exists and entered into a contract in the corporate name when he knows that no corporation has been formed, either because no attempt has been made to file articles of incorporation or because he has already received rejected articles of incorporation from the filing agency. In these cases, the third person has dealt solely with the "corporation" and has not relied on the personal assets of the defendant. The imposition of personal liability in this class of case, it has sometimes been argued, gives the plaintiff more than he originally bargained for. On the other hand, to recognize limited liability in this situation threatens to undermine the incorporation process, since one then may obtain limited liability by consistently conducting business in the corporate name. Most courts have imposed personal liability in this situation. E.g., Robertson v. Levy, 197 A.2d 443 (D.C. App. 1964).

(5) A final class of cases involves inactive investors who provide funds to a promoter with the instruction, "Don't start doing business until you incorporate." After the promoter does start business without incorporating, attempts have been made, sometimes unsuccessfully, to hold the investors liable as partners. E.g., Frontier Refining Co. v. Kunkels, Inc., 407 P.2d 880 (Wyo. 1965). One case held that the language of section 146 of the 1969 Model Act ["persons who assume to act as a corporation are liable for preincorporation transactions"] creates a distinction between active and inactive participants, makes only the former liable as partners, and therefore relieves the latter of personal liability. Nevertheless, "active" participation was defined to include all investors who actively participate in the policy and operational decisions of the organization and is, therefore, a larger group than merely the persons who incurred the obligation in question on behalf of the "corporation." Timberline Equipment Co. v. Davenport, 267 Or. 64, 72-76, 514 P.2d 1109, 1113-14 (1973).

After a review of these situations, it seemed appropriate [to the ABA Committee, not to the Idaho Committee] to impose liability only on persons who act as or on behalf of corporations "knowing" that no corporation exists. Analogous protection has long been accorded under the uniform limited partnership acts to limited partners who contribute capital to a partnership in the erroneous belief that a limited partnership certificate has been filed. UNIFORM LIMITED PARTNERSHIP ACT § 12 (1916); REVISED UNIFORM LIMITED PARTNERSHIP ACT § 3.04 (1976). Persons protected under § 3.04 of the latter are persons who "erroneously but in good faith" believe that a limited partnership certificate has been filed. The language of [ABA Official Text] section 2.04 has essentially the same meaning.

While no special provision is made in section 204, the section does not foreclose the possibility that persons who urge defendants to execute contracts in the corporate name knowing that no steps to incorporate have been taken may be estopped to impose personal liability on individual defendants. This estoppel may be based on the inequity perceived when persons, unwilling or reluctant to enter into a commitment under their own name, are persuaded to use the name of a nonexistent corporation, and then are sought to be held personally liable under section 204 by the party advocating that form of execution. By contrast, persons who knowingly participate in a business under a corporate name are jointly and severally liable on "corporate" obligations under section 204 and may not argue that plaintiffs are "estopped" from holding them personally liable because all transactions were conducted on a corporate basis.

IDAHO REPORTER'S COMMENT

New I.C. § 30-1-204 substitutes the word "when" for the ABA Official Text's "knowing." The

effect of this substitution is to go farther than the Official Text toward elimination of the de facto corporation and related doctrines, with the possible exception of the estoppel situation described in the final paragraph of the ABA Official Comment, next above.

This new section does not make any substantive change from prior I.C. § 30-1-146. It was clearly the intention under earlier Model Acts to eliminate the de facto corporation doctrine. This unequivocal position may have policy advantages in disputes involving claimed "innocence" on both sides. The practical result remains that if any person assumes to act as a corporation before the certificate is issued by the secretary of state, then that person will be personally liable for all liabilities incurred during that time.

30-1-205. Organization of corporation. — (1) After incorporation:

(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect directors and complete the organization of the corporation, or

(ii) To elect a board of directors who shall complete the organization of the corporation.

(2) Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one (1) or more written consents describing the action taken and signed by each incorporator.

(3) An organizational meeting may be held in or out of this state.

History.

I.C., § 30-1-205, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Following incorporation, the organization of a new corporation must be completed so that it may engage in business. This usually requires adoption of bylaws, the appointment of officers and agents, the raising of equity capital by the issuance of shares to the participants in the venture, and the election of directors.

Earlier versions of the Model Act required initial directors to be named in the articles and provided that they complete the organization of the corporation. Many states followed this pattern, but others provided that the incorporators organize the corporation or meet to elect a board of directors to organize the corporation. The goal of all these provisions was usually to permit the completion of the organization of the corporation with minimum expense and formality, though in many cases it was felt necessary for business decisions to be made at an early stage by the persons with responsibility for business operation.

Experience in states that followed the Model Act pattern revealed that multiple organizational meetings were often necessary, particularly where for reasons of convenience or secrecy both the incorporators and initial directors were "dummies" without any financial interest in the enterprise who were not expected to make any significant business decisions. In this situation, the initial directors formally organized the corporation, including issuing of at least some shares; immediately following this organizational meeting, the new shareholders met to elect a permanent board of directors who were to manage the business. In many instances, the permanent board of directors also had to meet immediately after its selection by the shareholders to consider business questions that must be resolved promptly, such as authorization of employment contracts or the valuation of property or services to be accepted as consideration for shares.

Section 205 simplifies the formation process by allowing alternative methods of completing the formation of the corporation.

First, section 205(1)(a) contemplates that if the draftsman elects to set forth the names of the initial directors in the articles of incorporation, the persons so named will organize the corporation. It is expected that initial directors will be named only if they will be the permanent board of directors and there is no objection to the disclosure of their identity in the articles of incorporation.

Second, section 205(1)(b) provides alternative methods for completing the organization of the corporation if initial directors are not named in the articles of incorporation. The incorporators may themselves complete the organization, or they may simply meet to elect a board of directors who are then to complete the organization. It is contemplated that in routine incorporations, the first alternative will be elected, while in more complex situations when prompt business decisions must be made, the second alternative will be chosen and the completion of the organization will be turned over to the board of directors representing the investment interests in the corporation.

Sections 205(2) and (3) are limited to meetings of incorporators since sections 821 and 822 permit the same actions by the board of directors. If a meeting of shareholders is necessary, sections 701 and 704 give them the same flexibility that is given incorporators under sections 205(2) and (3).

IDAHO REPORTER'S COMMENT

This new Model Act § 205 brings incorporators in as an alternative to directors for purposes of conducting the organizational meeting. This jibes with new section 202 which no longer requires naming the initial directors in the articles and with the apparent negative experience of multiple organizational meetings under the existing scheme.

30-1-206. Bylaws. — (1) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(2) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

History.

I.C., § 30-1-206, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The responsibility for adopting the original bylaws is placed on the person or persons completing the organization of the corporation.

Section 206(2) restates the accepted scope of bylaw provisions. For a list of Model Act provisions that become effective only if specific reference is made to them in the bylaws, see the Official Comment to section 202. Provisions set forth in bylaws may additionally be contained in shareholder or board resolutions unless this Act requires them to be set forth in the bylaws.

The power to amend or repeal bylaws, or adopt new bylaws after the formation of the corporation is completed, is addressed in sections 1020 through 1022 of the Model Act.

IDAHO REPORTER'S COMMENT

The significant language changes in Model Act § 206 compared to prior I.C. § 30-1-27 are the specific empowerment of incorporators and the lack of any mention of shareholders. Given the flexibility in ultimate bylaw adoption procedures under both the prior Idaho statute and the new Model Act, however, your reporter does not see any significant practical change here.

30-1-207. Emergency bylaws. — (1) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (4) of this

section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

(a) Procedures for calling a meeting of the board of directors;

(b) Quorum requirements for the meeting; and

(c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws:

(a) Binds the corporation; and

(b) May not be used to impose liability on a corporate director, officer, employee or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.
I.C., § 30-1-207, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 207 is no longer an optional provision (as was the case with its predecessor in earlier versions of the Model Act) but is unqualifiedly recommended for adoption. The problem it addresses is potentially present in every state and in every corporation and the widespread acceptance of the earlier provision to date by a number of states argues that it be uniformly adopted.

The adoption of emergency bylaws in advance of an emergency not only clarifies lines of command and responsibility but also tends to ensure continuity of responsibility. The board of directors may be authorized by the emergency bylaws, for example, to designate the officers or other persons, in order of seniority and subject to various conditions, who may be deemed to be directors during the emergency.

The definition of "emergency" adopted by subsection (4) is broader than a nuclear disaster or attack on the United States. It includes any catastrophic event, such as an airplane crash or fire, that makes it difficult or impossible for a quorum of the corporation's board of directors to be assembled. While there apparently has been no recent illustration of a public corporation facing such a catastrophic event, its possibility should not be ignored. In order to encourage corporations to adopt emergency bylaws, section 207(3) broadly validates all corporate actions taken "in good faith" pursuant to them and immunizes all corporate directors, officers, employees, and agents from liability as a result of these actions. The phrase "action taken in good faith in accordance with the emergency bylaws" has been substituted for "willful misconduct," the language of the earlier Model Act provision. This change is designed to conform the standard for immunity here and elsewhere in the Model Act and represents no substantive change.

A corporation that does not adopt emergency bylaws under this section may nevertheless exercise the powers described in section 303 in the event of an emergency as defined in section 207(4).

IDAHO REPORTER'S COMMENT

The predecessor to this Model Act section was not adopted by Idaho in the 1979 revision. About 60% of the jurisdictions do provide for emergency bylaws. This provision seems potentially most significant, of course, for large publicly-held companies but could prove useful in any corporate context. The idea seems to have originated during the Cuban Missile Crisis. See Gibson, "Corporate Management During Nuclear Attack," 17 Bus. Law. 249 (1962).

PART 3. PURPOSES AND POWERS

30-1-301. Purposes. — (1) Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

(2) A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this chapter only if permitted by, and subject to all limitations of, the other statute.

History.
I.C., § 30-1-301, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 301(1) provides that every corporation automatically has the purpose of engaging in any lawful business unless a narrower purpose is described in the articles of incorporation. The specification of an "any lawful business" clause has become so nearly universal in states that permit the clause that no reason exists for treating it otherwise than as the norm for the "standard" corporation.

The option of a narrower purpose clause is most likely to be elected only in situations where one or more participants in the corporation desire to limit or retain a check on the business operations of the corporation. The articles of incorporation may limit lines of business in which the corporation may engage. It should be recognized, however, that the limited scope of the ultra vires concept in litigation between the corporation and outsiders means that a third person entering into a transaction that violates the restrictions in the purpose clause may be able to enforce the transaction in accordance with its terms if he was unaware of the narrow purpose clause when he entered the transaction. See the Official Comment to section 304.

Many corporations may also find it desirable to supplement a general purpose clause with an additional statement of business purposes. This may be necessary for licensing or for qualification purposes in some states.

Section 301(2) is designed to tie in the limitless lawful purpose corporation permitted by section 301(1) with the numerous state statutes that impose regulations or limitations on corporations formed to, or actually engaging in, certain lines of business. These state statutes are of various types.

a. Special incorporation statutes. Some of these statutes, particularly those relating to banking and insurance, establish a separate incorporation process and incorporating agency. These special incorporating statutes may refer back to or incorporate by reference portions of the general business corporation statute.

b. Miscellaneous regulatory statutes. Other regulatory statutes may permit incorporation under the general business corporation act if the corporation imposes restrictions or limitations in its articles of incorporation; these restrictions may relate to the business in which the corporation may engage, its manner of internal governance, or the persons who may or may not be shareholders and participate in the venture. The language of section 301(2) is designed to cover all these multiple variations and is a substitute for the narrower language "except for the purpose of banking or insurance" that appeared in earlier versions of the Model Act and the statutes of many states.

c. Professional corporations. Traditionally, incorporation was not permitted at all for the purpose of practicing the learned professions -- e.g., law, medicine, and dentistry -- primarily because of the personal skills and confidential relationships between the lawyer and client or physician and patient. In the early 1960's, however, a significant movement toward incorporation of professionals surfaced as part of an effort by professionals to obtain employee federal tax benefits. Professionals hoped to form corporations to conduct their practice as employees of the corporation rather than as independent entrepreneurs. Early efforts by professionals to form entities to conduct their practice (despite the lack of state statutory authority to incorporate) met with opposition from the Internal Revenue Service. In 1960 the I.R.S. issued the "Kintner" regulations, which in effect provided that federal tax status would be determined on the basis of the organization's characterization under state law. TREAS. REGS. § 301.7701-2 (1960). In response, a number of states passed legislation specifically authorizing professionals to incorporate. Recognition of the corporate tax status of professional corpora-

tions was eventually conceded. REV. RUL. 70-101, 1970-1 C.B. 278. All jurisdictions now have statutes providing for incorporation for the purpose of practicing a profession, and in 1977 a Professional Corporation Supplement to the Model Act was approved. For further consideration of professional corporation acts, see the Annotations to the Model Professional Corporation Supplement.

d. Miscellaneous organizations. Other types of corporations, such as nonprofit corporations, cooperatives, and unions, usually may not incorporate under the business corporation act. Many states have enacted special statutes for these classes of entities: A Model Nonprofit Corporation Act was approved in 1952 and has been periodically revised since then.

Section 301(2) is designed to preserve all statutory requirements applicable to all of these various classes of specialized and nonbusiness corporations.

IDAHO REPORTER'S COMMENT

The change here is more formalistic than substantive. The idea of general purposes is retained, but now it works automatically without regard to redundant statement in the articles, which are no longer required to recite any purposes. See section 202 and COMMENTS thereto.

30-1-302. General powers. — Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;

(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the corporation, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;

(10) To conduct its business, locate offices, and exercise the powers granted by this chapter within or without this state;

(11) To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) To pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents;

(13) To make donations for the public welfare or for charitable, scientific, or educational purposes;

(14) To transact any lawful business that will aid governmental policy;

(15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

History.
I.C., § 30-1-302, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Jurisdiction.

Cooperative was properly treated as a corporation for the purpose of diversity jurisdiction because it was incorporated under state law. The unconventional nature of the corporation did not deprive it of its corporate status or its susceptibility to treatment as a corporation under 28 U.S.C.S. § 1332(c)(1), and the cooperative, and not its members, was the real party in interest under § 30-1-302. The district court, therefore, had subject matter jurisdiction under 28 U.S.C.S. § 1332(a) because there was complete diversity of citizenship. Kuntz v. Lamar Corp., 385 F.3d 1177 (9th Cir. 2004).

ABA OFFICIAL COMMENT

The law of corporations has always proceeded on the fundamental assumption that corporations are creations with limited power; such an assumption was articulated by the United States Supreme Court as early as 1804, *Head & Armory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127,169 (1804), and appears never to have been seriously questioned as a judicial matter.

It is clear that narrow and limited powers clauses are undesirable: they encourage litigation by bringing into question reasonable transactions that further the business and interest of the corporation and to the extent transactions are unauthorized, may defeat valid and reasonable expectations. The history of the Model Act and of many state statutes in this area is largely one ensuring that corporate powers are broad enough to cover all reasonable business transactions.

In developing section 3.02, serious consideration was given to whether there was a continued need for a long list of corporate powers or whether a general provision granting every corporation power to act to the same extent as an individual might be substituted. Because of the long history of these powers, however, it was feared that no matter how broadly phrased a general provision might be, a court might conclude that some power might not exist because no specific reference to it was made in the statute. It was also feared that cautious attorneys might begin to restore power clauses to articles of incorporation out of concern that a general clause of the type in question might not be interpreted literally. Hence, the present language, which is similar to that included in the statutes of California and other states, was adopted. The general clause granting the corporation essentially the same powers as an individual is coupled with a nonexclusive listing of powers, including the traditional power clauses that appear in many state statutes.

The general philosophy of section 302 is thus that corporations formed under the Model Act provisions should be automatically authorized to engage in all acts and have all powers that an individual may have. Because broad grants of power of this nature may not be desired in some corporations, section 302 generally authorizes articles of incorporation to deny or limit specific powers to a specific corporation if that is felt desirable. This power to exclude specific powers does not reflect a substantive change from earlier versions of the Model Act (which did not contain an express provision to this effect) but simply makes explicit what was always implicit. Illustrative of the powers that may be appropriate for limitation in specific corporations are the powers (discussed below) to make political contributions to the extent permitted by law or to make expenditures to influence elections affecting the corporate business to the extent permitted by law.

The powers listed in section 302 were broadened in several significant respects:

(1) All limitations on loans to directors have been eliminated. The wisdom and propriety of these loans should be evaluated on the basis of general fiduciary standards and the benefits to the corporation. See sections 830, 831, and 832. Section 302(11) thus rejects the conceptual argument that because certain transactions are subject to abuse, all such transactions should be prohibited.

(2) It is made clear in section 302(12) that former as well as present directors, officers, employees, and agents may participate in pension, option, and similar benefit plans.

(3) Section 302(15) permits payments or donations or other acts "that further the business and affairs of the corporation." This clause, which is in addition to and independent of the power to make charitable and similar donations under section 302(13), permits contributions for purposes that may not be charitable, such as for political purposes or to influence elections. This power exists only to the extent consistent with law other than the Model Act. It is the purpose of this section to authorize all corporate actions that are lawful or not against public policy.

The powers of a corporation under the Model Act exist independently of whether a corporation has a broad or narrow purpose clause. A corporation with a narrow purpose clause nevertheless has the same powers as an individual to do all things necessary or convenient to carry out its business. Many actions are therefore intra vires even though they do not directly affect the limited purpose for which the corporation is formed. For example, a corporation may generally make charitable contributions without regard to the purpose for which the charity will use the funds or may invest money in shares of other corporations without regard to whether the corporate purpose of the other corporation is broader or narrower than the limited purpose clause of the investing corporation. In some instances, however, a limited or narrow purpose clause may be considered to be a restriction on corporate powers as well as a restriction on purposes. Since the same ultra vires rule is applicable to corporations that exceed their purposes or powers (see the Official Comment to section 304), it is not necessary to determine whether a narrow purpose clause also limits the powers of the corporation but simply whether the purpose of the transaction in question is consistent with the purpose clause. Of course, these issues cannot arise in corporations with an "any lawful business" purpose clause.

IDAHO REPORTER'S COMMENT

The only changes here appear to be the "unless" clause at the outset of new Model Act § 302, the specific reference to "the same powers as an individual" and the addition of new subsection (15).

30-1-303. Emergency powers. — (1) In anticipation of or during an emergency defined in subsection (4) of this section, the board of directors of a corporation may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent; and

(b) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(2) During an emergency defined in subsection (4) of this section, unless emergency bylaws provide otherwise:

(a) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(b) One (1) or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(a) Binds the corporation; and

(b) May not be used to impose liability on a corporate director, officer, employee or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.
I.C., § 30-1-303, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 303 should be read in conjunction with section 207, which authorizes a corporation to adopt emergency or standby bylaws. Section 303 grants every corporation limited powers to act in an emergency even though it has failed to enact emergency bylaws under section 207.

An "emergency" for purposes of section 303 is defined in subsection (4) as any catastrophic event that makes it difficult or impossible to assemble a quorum of directors. In this situation, section 303(2) dispenses with or relaxes notice requirements and permits corporate officers to serve as directors in order to achieve a quorum. The section also authorizes the board of directors, either before or during an emergency, to modify lines of succession and relocate the principal business office of the corporation. These actions may be taken only by the board of directors at a meeting at which a quorum is present after giving effect, if necessary, to section 303(2).

These minimal provisions, it is believed, should permit a corporation to continue to function in the face of an emergency even if no emergency bylaws have been adopted under section 207.

IDAHO REPORTER'S COMMENT

See my COMMENT to section 207.

30-1-304. Ultra vires. — (1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(2) A corporation's power to act may be challenged:

(a) In a proceeding by a shareholder against the corporation to enjoin the act;

(b) In a proceeding by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation; or

(c) In a proceeding by the attorney general under section 30-1-1430, Idaho Code.

(3) In a shareholder's proceeding under subsection (2)(a) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

History.
I.C., § 30-1-304, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Cross References.
Attorney general, § 67-1401 et seq.

ABA OFFICIAL COMMENT

The basic purpose of section 304 — as has been the purpose of all similar statutes during the 20th century — is to eliminate all vestiges of the doctrine of inherent incapacity of corporations. See Campbell, "The Model Business Corporation Act," 11-4 BUS. LAW. 98,102 (1956). Under this section it is unnecessary for persons dealing with a corporation to inquire into limitations on its purpose or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with the corporation is not bound by them. The phrase in section 304(1) that the "validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act" applies equally to the use of the doctrine as a sword or as a shield: a third person may no more avoid an undesired contract with a corporation on the ground the corporation was without authority to make the contract than a corporation may defend a suit on a contract on the ground that the contract is ultra vires.

The language of section 304 extends beyond contract and conveyances of property; "corporate action" of any kind cannot be challenged on the ground of ultra vires. For this reason it makes no difference whether a limitation in articles of incorporation is considered to be a limitation on a purpose or a limitation on a power; both are equally subject to section 304. Corporate action also includes inaction or refusal to act. The common law of ultra vires distinguished between executory contracts, partially executed contracts, and fully executed ones; section 304 treats all corporate action the same — except to the extent described in section 304(2) — and the same rules apply to all contracts no matter at what stage of performance.

Section 304, however, does not validate corporate conduct that is made illegal or unlawful by statute or common law decision. This conduct is subject to whatever sanction, criminal or civil, that is provided by the statute or decision. Whether or not illegal corporate conduct is voidable or rescindable depends on the applicable statute or substantive law and is not affected by section 304.

Section 304 also does not address the validity of essentially intra vires conduct that is not approved by appropriate corporate action. It does not deal, for example, with the enforceability of an executory contract to sell substantially all the assets of a corporation not in the ordinary course of business that was not approved by the shareholders as required by section 1202. This type of transaction is not beyond the purposes or powers of the corporation; it simply has not been approved by the corporate authorities as required by law. Similarly, section 304 does not deal with whether a corporation is bound by the action of a corporate agent if the action requires, but has not received, approval by the board of directors. Whether or not the corporation is bound by this action depends on the law of agency, particularly the scope of apparent authority and whether the third person knew or should have known of the defect in the corporate approval process. These actions may be ultra vires with respect to the corporation and are not controlled by section 304.

Similarly, corporate action is not ultra vires under section 304 merely because it constitutes a breach of fiduciary duty. For example, a misuse of corporate assets for personal purposes by an officer or director is a breach of fiduciary duty and may be enjoined. Similarly, in some circumstances a lien on corporate assets and a contract entered into by the corporation may be canceled or enjoined if they constitute breaches of fiduciary duty and the third person is charged with knowledge that they were improper. These transactions, however, are not ultra vires with respect to the corporation, and cannot be attacked under section 304. They may be enjoined because of breach of the fiduciary duty, not because the transaction exceeds the powers or purposes of the corporation.

Section 304(2), like the prior Model Act provisions, permits challenges to the corporation's lack of power in three limited classes of cases:

(1) In suits by the attorney general under section 1430. This provision does not answer the question whether or not a corporation may be dissolved or enjoined by the attorney general for committing an ultra vires act; it simply preserves the power of the state to assert that certain corporate action was ultra vires.

(2) In a suit by the corporation, either directly or through a legal representative, against incumbent or former officers or directors for authorizing or causing the corporation to engage in an ultra vires act. Again, this section does not address whether or not there is liability for causing the corporation to enter into an ultra vires act; it simply preserves the power of the corporation to assert that certain corporate action was ultra vires.

(3) In a suit by a shareholder against the corporation to enjoin an ultra vires act. This suit, however, is subject to the requirements of section 304(3). Under this subsection an ultra vires act may be enjoined only if all "affected parties" are parties to the suit. The requirement that the action be "equitable" generally means that only third persons dealing with a corporation while specifically aware that the corporation's action was ultra vires will be enjoined. The general phrase "if equitable" was retained because of the possibility that other circumstances may exist in which it may be equitable to refuse to enforce an ultra vires contract. Further, if enforcement of the contract is enjoined, either the third person or the corporation may in the discretion of the court be awarded damages from the other for loss (excluding anticipated profits).

Section 304(3) thus authorizes a court to enjoin or set aside an ultra vires act grant or other relief that may be necessary to protect the interests of all affected persons, including the interests of third persons who deal with the corporation.

IDAHO REPORTER'S COMMENT

The only changes here appear to be non-substantive editorial changes in language, beginning with the title caption which was changed from "Unauthorized assumption of corporate powers" (prior I.C. § 30-1-146) to emphasize the universal application of the section. Likewise, specific references to corporate contracts or to "transfers or conveyances" were uniformly replaced by references to "corporate action." Similarly, references to "invalidity" were uniformly replaced by references to permissible "challenges." And the phrase "capacity or power to act" was replaced by the more inclusive word "power."

Part 4. Name

30-1-401. Corporate name. — (1) A corporate name:

(a) Must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," or words or abbreviations of like import in another language; provided however, that if the word "company" or its abbreviation is used it shall not be immediately preceded by the word "and" or by an abbreviation of or symbol representing the word "and";

(b) May not contain language falsely stating or implying government affiliation or stating or implying that the corporation is organized for a purpose other than that permitted by section 30-1-301, Idaho Code, and its articles of incorporation.

(2) Except as authorized by subsections (3) and (4) of this section, a corporate name must be distinguishable upon the records of the secretary of state from:

(a) The corporate name of a corporation incorporated or authorized to transact business in this state;

(b) A name reserved or registered under section 30-1-402 or 30-1-403, Idaho Code, or reserved under section 53-2-109, Idaho Code, or as reserved under section 30-6-109 or 53-603, Idaho Code, as appropriate pursuant to section 30-6-1104, Idaho Code;

(c) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(d) The corporate name of a nonprofit corporation incorporated or authorized to transact business in this state; and

(e) The name of any limited partnership, limited liability partnership or limited liability company which is organized under the laws of this state or registered to do business in this state.

(3) A corporation may apply to the secretary of state for authorization to use a name that is not distinguishable on his records from one (1) or more of the names described in subsection (2) of this section. The secretary of state shall authorize use of the name applied for if:

(a) The other corporation, holder of a reserved or registered name, limited partnership, limited liability partnership or limited liability company consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the name of the applying corporation; or

(b) The applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A corporation may use the name, including the fictitious name, of another domestic or foreign corporation or limited liability company that is used in this state if the other corporation or limited liability company is organized or authorized to transact business in this state and the proposed user corporation:

(a) Has merged with the other corporation or limited liability company;

(b) Has been formed by reorganization of the other corporation or limited liability company; or

(c) Has acquired all or substantially all of the assets, including the name, of the other corporation or limited liability company.

(5) This chapter does not control the use of assumed business names, governed by "The Assumed Business Names Act of 1997," chapter 5, title 53, Idaho Code.

(6) Nothing in this section shall abrogate or limit the law as to unfair competition or unfair practice in the use of trade names, nor derogate from the common law, the principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade names.

(7) The assumption of a name in violation of this section shall not affect or vitiate the corporate existence, but the courts of this state, having equity jurisdiction, may, upon the application of the state, or of any person, unincorporated association, or corporation interested or affected, enjoin such corporation in violation from doing business under any name assumed in violation of this section.

History.

I.C., § 30-1-401, as added by 1997, ch. 366, § 2, p. 1080; am. 1999, ch. 212, § 1, p. 563; am. 2005, ch. 272, § 1, p. 836; am. 2006, ch. 144, § 3, p. 407; am. 2008, ch. 176, § 2, p. 518.

STATUTORY NOTES

Amendments.

The 2006 amendment, by ch. 144, substituted "53-2-109" for "53-203" in subsection (2)(b).

The 2008 amendment, by ch. 176, in subsection (2)(b), inserted "Idaho Code, or as reserved under section 30-6-109" and added "as appropriate pursuant to section 30-6-1104, Idaho Code."

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the amendment of this section should take effect on and after July 1, 2008.

JUDICIAL DECISIONS

Cited in: Wait v. Leavell Cattle, Inc., 136 Idaho 792, 41 P.3d 220 (2001).

ABA OFFICIAL COMMENT

All of part 4, relating to corporate names, has been reviewed and revised in light of the responsibilities that should reasonably be placed on secretaries of state considering their available resources.

Section 401 deals with two basic name requirements: (1) the name must indicate "corporateness," and (2) the name must not be the same as, or deceptively similar to, certain other business names.

1. INDICATION OF CORPORATENESS. Section 401(1) permits the words indicating corporateness to include "corporation," "incorporated," "limited," or "company" or an abbreviation of them. While the words "company" and "limited" are commonly used by partnerships or limited partnerships, and therefore do not uniquely indicate corporateness, their use is widespread and is continued since it creates no discernible harm. The Act also permits the use of words or abbreviations in another language that import corporateness.

2. NAMES THAT ARE "DISTINGUISHABLE UPON THE RECORDS OF THE SECRETARY OF STATE" [NOTE: This revised language is not adopted in I.C. § 30-1-401]. The revision of the Model Act is based on the fundamental premise that its name provisions should only ensure that each corporation has a sufficiently distinctive name so that it may be distinguished from other corporations upon the records of the secretary of state. The general business corporation statute should not be a partial substitute for a general assumed name, unfair competition, or antifraud statute. As a result, the [Official Text] Model Act does not restrict the power of a corporation to adopt or use an assumed or fictitious name with the same freedom as an individual or impose a requirement that an "official" name not be "deceptively similar" to another corporate name (a requirement of earlier versions of the Model Act). [NOTE: This requirement is retained in I.C. § 30-1-401]. Principles of unfair competition, not the business corporation act, provide the limits on the competitive use of similar names.

The phrase "distinguishable upon the records of the secretary of state" is drawn from section 102(a)(1) of the Delaware General Corporation Law. The principal justifications for requiring a distinguishable official name are (1) to prevent confusion within the secretary of state's office and the tax office and (2) to permit accuracy in naming and serving corporate defendants in litigation. Thus, confusion in an absolute or linguistic sense is the appropriate test under the Model Act, not the competitive relationship between the corporations, which is the test for fraud or unfair competition. The precise scope of "distinguishable upon the records of the secretary of state" is an appropriate subject of regulation by the office of secretary of state in order to ensure uniformity of administration. Corporate names that differ only in the words used to indicate corporateness are generally not distinguishable. Thus, if ABC Corporation is in existence, the names "ABC Inc.," "ABC Co.," or "ABC Corp." should not be viewed as distinguishable. Similarly, minor variations between names that are unlikely to be noticed, such as the substitution of a ";" for a "," or the substitution of an Arabic numeral for a word, such as "2" for "Two," or the substitution of a lower case letter for a capital, such as "d" for "D," generally should not be viewed as being distinguishable.

The [Official Text, not Idaho] elimination of the "deceptively similar" requirement that appeared in earlier versions of the Model Act and the specific recognition appearing in section 401(5), that corporations may use artificial or fictitious names to the same extent an individual can, are based on the fact that the secretary of state does not generally police the unfair competitive use of names and, indeed, usually has no resources to do so. For example, assume that "ABC Corporation" operates a retail furniture store in Albany, New York, and another group wants to use the same name to engage in a business involving imports of textiles in New York City. An attempt to incorporate a second "ABC Corporation" (or a very close variant such as "ABC Corp." or "ABC Inc." should be rejected because the names are not distinguishable upon the records of the secretary of state. If the second group uses a distinguishable official name, like "ABD Corporation," it probably may lawfully assume the fictitious name "ABC Corporation" to import goods in New York City if it files the assumed name certificate required by New York law. In these situations, the secretary of state will usually not know in what business or in what geographical area "ABC Corporation" is active or what name ABD Corporation is actually using in its business; he simply maintains an alphabetical list of "official" corporate names as they appear from corporate records and makes his decision about whether a proposed name is distinguishable from other "official names" by comparing the

proposed name with those on the list. This assumes that there is either no assumed name statute or that if there is such a statute it requires only local filing in counties or, as in New York, a central filing which does not become part of the corporate records maintained by the secretary of state's office. These assumptions are generally if not universally correct.

3. CLASSES OF UNAVAILABLE NAMES. Section 401(2) lists classes of "official names" that are not available. Names in use and thus unavailable from the standpoint of the secretary of state's uniqueness test for "official names" come from the following sources: (1) official names of profit or not-for-profit domestic corporations, (2) official names of foreign profit or not-for-profit corporations qualified to transact business, (3) reserved names, (4) registered names and (5) [an Idaho addition to the ABA Official Text] names of limited partnerships, limited liability partnerships and limited liability companies organized or doing business in the state. The secretary of state becomes involved with fictitious or assumed names only in the situation where a foreign corporation, planning to transact business in a state, discovers that its name is not available in that state. To qualify it must adopt an assumed or fictitious name as its "official name" in the state, see section 1506. Such a fictitious or assumed name is thereafter an "official" name and is unavailable to the same extent as any other "official name" in use is unavailable.

4. CONSENT TO USE. Section 401(3)(a) authorizes the secretary of state to accept a name that is the same as, or deceptively similar to, the name of another corporation if that corporation files an undertaking in a form satisfactory to the secretary of state that it will thereafter change its name to a name that is not the same as, or deceptively similar to, the name of the applying corporation. This privilege may be important in acquisition transactions where a new corporation is to take over the business of an existing corporation without a change in corporate name. The secretary of state may require the undertaking to specify the new name which the corporation will adopt and the time period within which the change will be made. The requirements imposed on the undertaking should be consistent with the limited role of the secretary of state in the administration of section 401.

IDAHO REPORTER'S COMMENT

In addition to a number of stylistic and language changes from the predecessor Model Act section (adopted in Idaho in 1979 with two additions discussed below), new Model Act § 401 specifically recognizes the use of fictitious names by corporations and makes clear that the name provisions of the Model Act do not generally deal with the use of fictitious names.

Idaho added two ideas from pre-existing law when it enacted the previous Model Act section in 1979. First, is the last part of prior I.C. § 30-1-8(a), designed to make it clear that the words "and company" (emphasis added), which are very often used in partnership names (e.g., "Street, MacDonald & Co."), shall not be used in corporate names. This idea is retained as the proviso at the end of new section 401(1)(a). Second, are the final two paragraphs of prior I.C. § 30-1-8, which were added to emphasize that any party dissatisfied with the administration of the name provisions would not be precluded from an unfair competition or trade name action in the courts. These provisions are retained as new subsections 401(6) and (7).

In addition to these two modifications made upon the 1979 enactment, I.C. § 30-1-8 was amended in 1994 to include among the unavailable names deceptively similar names of any limited partnership or limited liability company organized or registered under Idaho law. These provisions are retained in new section 401.

Finally and more generally, we have retained the basic standard for the availability of names ("same as, or deceptively similar to") in lieu of the new Official Text's "distinguishable upon the records of the secretary of state," a phrase taken from the Delaware statute.

30-1-402. Reserved name. — (1) A person may reserve the exclusive use of a corporate name, including a fictitious name for a foreign corporation whose corporate name is not available, by delivering an application to the secretary of state for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the secretary of state finds that the corporate name applied for is available, he shall reserve the name for the applicant's exclusive use for a nonrenewable four (4) month period.

(2) The owner of a reserved corporate name may transfer the reservation to another person by delivering to the secretary of state a signed notice of the transfer that states the name and address of the transferee.

History.
I.C., § 30-1-402, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The "reservation" of a corporate name is basically a device to simplify the formation of a new corporation or the qualification of a foreign corporation. By reserving a name, the persons considering the formation or qualification of the corporation can order stationery, prepare documents, etc. on the assumption that the reserved name will be available. Reference to a specific intent to form a new corporation is not required by the statute, however, since a secretary of state is not equipped and should not be asked to determine whether the requisite intent actually exists. For the same reason, "any person" is permitted to reserve a corporate name without reference to specific classes of persons who might wish to reserve a corporate name for various purposes.

Under section 402 of the Model Act, an available corporate name may be reserved:

(1) by persons considering the formation of a new domestic corporation;

(2) by persons considering the formation of a corporation in another state and the immediate qualification of that new corporation in this state; and

(3) by a foreign corporation planning or considering qualification in this state. The name reserved may be the foreign corporation's "official name" (if that name is available) or another name. The foreign corporation may thereafter use the reserved name as the name of a domestic subsidiary or, if its real name is unavailable, as a fictitious "official name" for its qualification under section 1506.

These illustrations are designed to suggest the scope and flexibility of section 402, and not to exhaust the possible uses to which a reserved name may be put.

Consideration was also given to whether reservation of a corporate name should be made renewable. The modern requirements for incorporation of a domestic corporation or the qualification of a foreign corporation are so simple that it is unlikely that more than six months could ever be realistically required to form or qualify a corporation. Also, it was believed to be undesirable to allow the reservation procedure to be used for other purposes, such as permanently setting aside a name by successive renewals. Therefore, only a single, one-time reservation is provided for, although after the six month period expires the name becomes available again and anyone, including the original reserver, may reserve the name. And nothing prevents the formation of an inactive corporation specifically to hold the desired name if a longer period of reservation is desired than the six month period specified by section 402.

IDAHO REPORTER'S COMMENT

The substance is preserved here from the predecessor Model Act provision adopted by Idaho in 1979. There are, however, a number of technical and stylistic changes. E.g., the list of persons and entities with "standing" to reserve a corporate name based on their intent is replaced by a general allowance without regard to intention. Further, the reservation is expressly made nonrenewable, which was technically unclear under the predecessor act. Finally, the details for execution of the application and notice of transfer are deleted since all such matters are centralized in part 1.

The only change from the new Official Text here is at the very end of subsection (1) where we replaced "120-day" with "six (6) month" to reflect ongoing administrative practice in the office of our secretary of state.

30-1-403. Registered name. — (1) A foreign corporation may register its corporate name, or its corporate name with any addition required by section 30-1-1506, Idaho Code, if the name is distinguishable on the records of the secretary of state from the corporate names that are unavailable under section 30-1-401(2), Idaho Code.

(2) A foreign corporation registers its corporate name, or its corporate name with any addition required by section 30-1-1506, Idaho Code, by delivering to the secretary of state for filing an application:

(a) Setting forth its corporate name, or its corporate name with any addition required by section 30-1-1506, Idaho Code, the state or country

and date of its incorporation, and a brief description of the nature of the business in which it is engaged; and

(b) Accompanied by a certificate of existence, or a document of similar import, from the state or country of incorporation.

(3) The name is registered for the applicant's exclusive use upon the effective date of the application.

(4) A foreign corporation whose registration is effective may renew it for successive years by delivering to the secretary of state for filing a renewal application, which complies with the requirements of subsection (2) of this section, between October 1 and December 31 of the preceding year. The renewal application when filed renews the registration for the following calendar year.

(5) A foreign corporation whose registration is effective may thereafter qualify as a foreign corporation under the registered name or consent in writing to the use of that name by a corporation thereafter incorporated under this chapter or by another foreign corporation thereafter authorized to transact business in this state. The registration terminates when the domestic corporation is incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.

History.

I.C., § 30-1-403, as added by 1997, ch. 366, § 2, p. 1080; am. 1999, ch. 212, § 2, p. 563.

ABA OFFICIAL COMMENT

The "registration" of a corporate name is basically a device by which a foreign corporation, not qualified to transact business in the state, can preserve the right to use its unique "real" name if it decides later to qualify in the state. In effect, registration ensures "real" name availability in areas of potential future expansion.

It is believed desirable to limit section 403 to this purpose and not allow it to become an indirect device for the preservation of trademarks, trade names, or possible assumed names. For this reason, generally only "real" names of foreign corporations may be registered (with exceptions described below). A broader approach would create issues better resolved under a trademark or similar statute, or by litigation under unfair competition principles, and might impose duties on secretaries of state that they are generally not equipped to handle, or could handle only at increased cost.

Registration of a name other than the "real" name is permitted in only one situation: if the "real" name of a foreign corporation is not available solely because it does not comply with section 1506, requiring the words "incorporated," "corporation," "company," or "limited," or an abbreviation of one of these words, the corporation may add one of these words or abbreviations and register its "real" name as so modified under section 403(1).

Confusion sometimes exists between "reservation" of names under section 402 and registration of names under section 403. A foreign corporation that is planning to qualify as a foreign corporation and finds that its name is available in the state may either register or reserve the name. Often a foreign corporation will have to decide whether to qualify or to create a domestic subsidiary; this well may be decided after the exclusive right to use the corporate name in the state is obtained either by reservation or by registration. If the corporation registers its name, it will be kept indefinitely; if it reserves, it will be kept for six months and then become available again. That is the foreign corporation's choice. If a foreign corporation registers its name and then elects to form a domestic or foreign subsidiary, the written consent procedure of section 403(5) allows the secretary of state to ascertain that the domestic subsidiary is related to the foreign corporation and that use of the registered name by that subsidiary is acceptable to the foreign parent.

If a foreign corporation's "real" name is unavailable, a foreign corporation may reserve any name--including one that is assumed or fictitious when compared with the corporation's "real"

name--for six months. But it may not register this type of name in light of the policy against allowing the name provisions of the Model Act to be used for purposes broader than the "unique name" issue. Nevertheless, a foreign corporation that wishes to be certain that a particular fictitious or assumed name will be available in the future may create an inactive domestic subsidiary with the desired name to preserve its future availability. See also the Official Comment to section 1506.

Section 403(5) provides that the protection of the name provided by this section terminates when the name is used pursuant to this section by the foreign corporation or its domestic or foreign subsidiary.

IDAHO REPORTER'S COMMENT

New Model Act § 403 consolidates previous sections 10 and 11 (I.C. §§ 30-1-10 & 11) and makes stylistic but not substantive changes.

Part 5. Office and Agent

30-1-501. Registered office and registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-501, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.

30-1-502. Change of registered office or registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-502, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.

30-1-503. Resignation of registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-503, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.

30-1-504. Service on corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-504, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.

Part 6. Shares and Distributions

30-1-601. Authorized shares. — (1) The articles of incorporation must set forth any classes of shares and series of shares within a class, and the number of shares of each class and series, that the corporation is authorized to issue. If more than one (1) class or series of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class or series and must describe, prior to the issuance of shares of a

class or series, the terms, including the preferences, rights and limitations of that class or series. Except to the extent varied as permitted by this section, all shares of a class or series must have terms, including preferences, rights and limitations, that are identical with those of other shares of the same class or series.

(2) The articles of incorporation must authorize:

(a) One (1) or more classes or series of shares that together have unlimited voting rights; and

(b) One (1) or more classes or series of shares, which may be the same class or classes as those with voting rights, that together are entitled to receive the net assets of the corporation upon dissolution.

(3) The articles of incorporation may authorize one (1) or more classes or series of shares that:

(a) Have special, conditional or limited voting rights, or no right to vote, except to the extent otherwise provided by this chapter;

(b) Are redeemable or convertible as specified in the articles of incorporation:

(i) At the option of the corporation, the shareholder, or another person or upon the occurrence of a specified event;

(ii) For cash, indebtedness, securities or other property; and

(iii) At prices and in amounts specified, or determined in accordance with a formula;

(c) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative or partially cumulative; or

(d) Have preference over any other class or series of shares with respect to distributions, including distributions upon the dissolution of the corporation.

(4) Terms of shares may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with section 30-1-120(11), Idaho Code.

(5) Any of the terms of shares may vary among holders of the same class or series so long as such variations are expressly set forth in the articles of incorporation.

(6) The description of the preferences, rights and limitations of classes or series of shares in subsection (3) of this section is not exhaustive.

History.

I.C., § 30-1-601, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 4, p. 907.

ABA OFFICIAL COMMENT

Section 601 adopts a new terminology from that traditionally used in corporation statutes to describe classes and series of shares that may be created, but makes only limited substantive changes from earlier versions of the Model Act. Traditional corporation statutes work from a perceived inheritance of concepts of "common shares" and "preferred shares" that at one time may have had considerable meaning but that today often do not involve significant distinctions. It is possible under modem corporation statutes to create classes of "common" shares that have important preferential rights and classes of "preferred" shares that are subordinate in all important economic aspects or that are indistinguishable from common shares in either voting rights or entitlement to participate in the assets of the corporation upon dissolution. The Model

Act breaks away from the inherited concepts of "common" and "preferred" shares and develops more general language to reflect the actual flexibility in the creation of classes and series of shares that exists in modern corporate practice.

1. SECTION 601(1). Section 601(1) requires that the articles of incorporation prescribe the classes and series of shares and the number of shares of each class and series that the corporation is authorized to issue. If the articles authorize the issue of only one class of shares, no designation or description of the shares is required, it being understood that these shares have both the power to vote and the power to receive the net assets of the corporation upon dissolution. See section 601(2). Shares with both of these characteristics are usually referred to as "common shares" or "common stock," but no specific designation is required by the Model Act. The articles of incorporation may set forth the number of shares authorized and permit the board of directors under section 602 to allocate the authorized shares among designated classes or series of shares.

If more than one class or series of shares is authorized, the terms, including the preferences, rights and limitations, of each class or series of shares must be described in the articles of incorporation before any shares of that class or series are issued, or the board of directors may be given authority to establish them under section 602. These descriptions constitute the "contract" of the holders of those classes and series of shares with respect to their interest in the corporation and must be set forth in sufficient detail reasonably to define their interest. The terms, including the preferences, rights and limitations, of shares with one or more special or preferential rights which may be authorized are further described in section 601(3).

If more than one class or series is authorized (or if only one class or series is originally authorized but at some future time one or more other classes or series of shares are added by amendment), the terms, including the preferences, rights and limitations of each class, classes or series of shares, including the class, classes or series that possess the fundamental characteristics of voting and residual equity financial interests, must be described before shares of those classes or series are issued. If both fundamental characteristics are placed exclusively in a single class of shares, that class may be described simply as "common shares" or by statements such as the "shares have the general distribution and voting rights," the "shares have all the rights of common shares," or the "shares have all rights not granted to the class A shares."

If the articles of incorporation create classes or series of shares that divide these fundamental rights among two or more classes or series of shares, it is necessary that the rights be clearly allocated among the classes and series. Specificity is required only to the extent necessary to differentiate the relative rights of the respective classes and series. For example, where one class or series has a liquidation preference over another, it is necessary to specify only the preferential liquidation right of that class or series; in the absence of a contrary provision in the articles, the remaining class or series would be entitled to receive the net assets remaining after the liquidation preference has been satisfied.

More than one class or series of shares may be designated as "common shares;" however, each must have a "distinguishing designation" under section 601(1), e.g., "nonvoting common shares" or "class A common shares," and the rights of the classes and series must be described. For example, if a corporation authorizes two classes of shares with equal rights to share in all distributions and with identical voting rights except that one class is entitled exclusively to elect one director and the second class is entitled exclusively to elect a second director, the two classes may be designated, e.g., as "Class A common" and "Class B common." What is required is language that makes the allocation of these rights clear.

Rather than describing the terms of each class or series of shares in the articles of incorporation, the corporation may delegate to the board of directors under section 602 the power to establish the terms of a class of shares (or of series within a class of shares) if no shares of that class or series have previously been issued. Those terms, however, must be set forth in an amendment to the articles of incorporation that is effective before the shares are issued.

2. SECTION 601(2). Section 601(2) requires that every corporation authorize one or more classes or series of shares that have the two fundamental characteristics of unlimited voting rights and the right to receive the net assets of the corporation upon its dissolution. These two fundamental characteristics need not be placed in a single class or series of shares but may be divided as desired. It is nevertheless essential that the corporation always have authorized shares with these two characteristics, and section 603 requires that shares having in the aggregate these characteristics always be outstanding.

Section 601(2) ensures that there is always in existence one or more classes or series of shares which share in the ultimate residual interest in the corporation and which are entitled to elect a board of directors and make other fundamental decisions with respect to the corporation.

3. SECTION 601(3). Section 601(3) lists the principal features that are customarily incorporated into classes or series of shares. Section 601(6) makes clear that this listing is not exhaustive

a. In general. Section 601(3) authorizes creation of classes or series of shares with a virtually unlimited range of preferences, rights and limitations. In earlier versions of the Model Act and in the statutes of many states, certain types of rights or privileges were not permitted. Many such statutes, for example, prohibited the creation of a class of voting shares without preferential financial rights that is callable at the discretion of the corporation ("callable common shares"). Another common prohibition was against shares that have the power to be converted at the option of the shareholder into other classes of shares that have preferential financial rights, or into debt securities of the corporation ("upstream") conversion privileges). For the reasons set forth below, these restrictions are not preserved in the Model Act.

b. Voting of shares. Any class or series of shares may be granted multiple or fractional votes per share without limitation. See section 721. Shares of any class or series may also be made nonvoting "except to the extent otherwise provided by this Act." This "except" clause refers to the provisions in the Model Act that permit shares that are designated to be nonvoting to vote as separate voting groups on amendments to articles of incorporation and other organic changes in the corporation that directly affect that class (sections 726 and 1004). In addition, shares may be given voting rights that are limited or conditional (e.g., on the passing of a specified number of dividends). Section 601(2), however, requires that there always be one or more classes or series of shares that together have unlimited voting rights.

c. Redemption of shares. Section 601(3)(b) permits classes or series of shares to be made redeemable on the terms set forth in the articles of incorporation. Under this section, shares may be made "redeemable" at the option of the holder, the corporation, or another person; shares redeemable at the option of the corporation are sometimes called "callable shares," while shares redeemable at the option of the shareholder are sometimes described as involving a "put." The Model Act permits either type of redemption for any class or series of shares and thereby permits the creation of redeemable or callable shares with-out limitation (subject only to the provisions that the class, classes or series of shares described in section 601(2) must always exist and that at least one share of each class or series with those rights must be outstanding under section 603).

Earlier versions of the Model Act and the statutes of many states contained a direct or indirect prohibition against callable voting shares or callable common shares. Even where such a prohibition exists, however, the same effect can be obtained by the use of consensual share transfer restrictions (see section 627). If it is possible to create what is essentially a callable voting share by agreement, there is no reason why such provisions should not be built directly and publicly into the capital structure of the corporation if that is desired.

The recognition of a redemption that is a "put" exercisable by the holders of the shares (or a third person such as holders of other classes of shares) is also new to the Model Act and is not permitted in many states. However, consensual share transfer restrictions may create a right that is indistinguishable from such a right of redemption, and a right of redemption is expressly recognized by many states in connection with certain specialized types of corporations such as open-end investment companies. As described below, if a right of redemption is recognized, prohibitions in earlier versions of the Model Act and many state statutes against "upstream" conversions serve no purpose.

The prices to be paid upon the redemption of shares under section 601(3)(b) and the amounts to be redeemed may be fixed in the articles of incorporation or "determined in accordance with a formula." The formula could be self contained, or, pursuant to the provisions of Section 601(4), could be determined by reference to extrinsic data or events. This is intended to permit the redemption price and the amounts to be redeemed to be established on the basis of matters external to the corporation, such as the purchase price of other shares, the level of the prime rate, the effective interest rate at which the corporation may obtain short or long term financing, the consumer price index or a designated currency ratio.

All redemptions of shares are subject to the restrictions on distributions set forth in section 640. See section 603(2).

d. Convertibility of shares. Section 601(3)(b) also permits shares of any class or series to be made convertible into shares of any other class or series or into cash, indebtedness, securities, or other property of the corporation or another person.

As described above, earlier versions of the Model Act and the statutes of many states prohibited so-called "upstream" conversions, that is, shares convertible into debt securities or into a class of shares having prior or superior preference rights. This restriction was eliminated from the Model Act since it was recognized that the power to make shares redeemable at the option of the shareholder for cash (see section 601(3)(b)(ii)) should logically permit the shares to be redeemable or convertible at the option of the shareholder into other shares with senior

preferential rights. Creditors of the corporation and holders of shares with preferential rights are less seriously affected by a conversion of shares into debt or into shares with preferential rights than they would be by the redemption of the shares for money, which is permitted by the Model Act, subject to the limitations of section 640. Shares made "redeemable" for debt under section 601(3)(b)(ii), achieve the same effect as a right to "convert" shares into debt securities. The authorization by the board of directors of the issuance of shares of one class or series convertible into shares of another class or series constitutes authorization of the issuance of the latter shares.

e. Extrinsic Facts. Subsection 601(4) permits the creation of classes of shares or series with terms that are dependent upon facts objectively ascertainable outside the articles of incorporation. See Section 120 and the related Official Comment for an explanation of the meaning of the phrase "facts objectively ascertainable" and the requirement for the filing of articles of amendment under the circumstances set forth in that section. Terms that depend upon reference to extrinsic facts may include dividend rates that vary according to some external index or event. Because such "variable rate" stock would be intended to respond to current market conditions, it is most often employed with "blank check" stock having terms set by the board of directors immediately before issuance. See the Official Comment to Section 602. Note that Section 621 requires the board to determine the adequacy of consideration received or to be received by the corporation before issuing shares. If shares with terms to be determined by reference to extrinsic facts are to be authorized for issuance, the board should take care to establish appropriately defined parameters for such terms in order to discharge its duties under Section 621.

f. Variation among holders. Subsection 601(5) permits the creation of classes of shares or series with terms that may vary among holders of the same class or series of shares so long as such variations are expressly set forth in the articles of incorporation. An example of the authority to vary terms among holders would be a provision that shares held by a bank or bank holding company in excess of a certain percentage would not have voting rights.

g. Nonexclusivity. Section 601(6) also recognizes that the description of the preferences, rights and limitations of classes or series of shares in subsection 601(3) is not exhaustive.

4. EXAMPLES OF CLASSES OR SERIES OF SHARES PERMITTED BY SECTION 601.

Section 601 authorizes the creation of new or innovative classes or series of shares without limitation or restriction. The section is basically enabling rather than restrictive since corporations often find it necessary to create new and innovative classes or series of shares for a variety of reasons, and with the disclosure of the terms of the new classes and series in the articles of incorporation that are a matter of public record there is no reason to restrict the power to create these classes and series. Innovative classes or series of shares may be created in connection with raising debt or equity capital. Securities with novel provisions are often created to meet perceived corporate needs in specific circumstances or because of financial problems generated by market conditions for capital. Classes or series of shares may also be created in order to effectuate desired control relationships among the participants in a venture. Classes or series of shares are likely to be used for this purpose in closely held corporations, whether or not statutory close corporation status is elected, but may also be used for this purpose by publicly held corporations.

Examples of such classes and series of shares are the following:

(1) Shares of one class may be authorized to elect a specified number of directors while shares of a second class may be authorized to elect the same or a different number of directors.

(2) Shares of one class or series may be entitled to vote as a separate voting group on certain transactions, but shares of two or more classes or series may be only entitled to vote together as a single voting group on the election of directors and other matters.

(3) Shares of one class or series may be nonvoting or may be given multiple or fractional votes per share.

(4) Shares of one class or series may be entitled to different dividend rights or rights on dissolution than shares of another class or series.

These examples are intended to be illustrative only and not to exhaust the variations permissible under the Model Act.

A corporation has power to issue debt securities under section 302(7). Although 601 authorizes the creation of interests that usually will be classed as "equity" rather than "debt," it is permissible to create classes or series of securities under section 601 that have some of the characteristics of debt securities. These securities are often referred to as "hybrid securities." Section 601 of the Model Act does not limit the development of hybrid securities, and equity securities may be created under the Model Act that embody any characteristics of debt that may be desired. Unlike some state statutes, however, the Model Act restricts the power to vote to securities classed as "shares" in the articles of incorporation.

IDAHO REPORTER'S COMMENT

When first enacted in Idaho in 1997, section 601's biggest change from old I.C. §30-1-15 was the elimination of the concepts of par value and stated capital. In addition, prior section 15 had the following language which was deleted from the end of § 601(3)(a): "or the Constitution of the United State of Idaho." With respect to this latter exception, our predecessor committee at the time of the 1979 revision reported as follows:

> These words were added because of the committee's concern that an unlimited power to deny voting rights might be inconsistent with Idaho Constitution Article XI, §4 ["The Legislature shall not prohibit corporations from electing directors by cumulative voting."], which the Attorney General of Idaho has opined allows a corporation to "create common stock with restricted voting privileges" but also mandates that "[a] corporation cannot remove the constitutional right of holders of common stock to vote in all elections for directors or managers of the corporation. Conversely, it is the opinion of the Attorney General that only preferred stock can be totally non-voting." Attorney General Opinion No. 78-33, August 16, 1978. The committee would support a constitutional amendment removing all corporation law matters from the Constitution in the interest of both modernization for the present and legislative flexibility for the future. But, for purposes of its present recommendation of a new Business Corporation Act, the committee realizes it must work within the confines of the existing constitutional provisions and will therefore recommend references to the Constitution where appropriate, as in proposed I.C. § 30-1-15.

It is the opinion of the Committee that the old 1978 A.G.'s opinion has become a "dead letter" in view of the 1982 general election amendment of Art. XI, §4, and that therefore the creation of non-voting stock is permitted.

Section 601(2) was totally new in 1997 and designed to ensure that shares with the specified voting and dissolution rights are always authorized.

Section 601(3) covers much of the same ground as prior I.C. § 30-1-15's second paragraph but was broadened to cover all classes of shares, not just "shares of preferred or special classes." Subparagraph (a) is substantively very similar to the last sentence in the first paragraph of prior I.C. § 30-1-15. The remainder of section 601(3) covers the same basic points as the second paragraph of prior I.C. § 30-1-15 but contains a number of changes designed to get rid of some artificial restrictions and to add flexibility. In connection with these changes, it should be noted that in 1997 the word "distribution" was substituted for "dividend" and "dissolution" for "liquidation" throughout much of the then new to Idaho Model Act. The financial amendments eliminating par value and stated capital led to conforming changes in this subsection.

The language of section 30-1-601 and of the ABA Official Comment was updated and clarified in 2004.

The 2004 changes here related most directly to the "elevation" of <u>series</u> of shares to practically co-equal status with <u>classes</u> of shares. Specifically, amended section 601 makes it clear that the basic statutory requirement that the articles provide for shares having certain characteristics (voting and liquidation rights, e.g.) may be satisfied by series, as well as classes, of shares.

Subsections (4) and (5) of section 601 were added on in 2004. Subsection (4) allows the creation of classes or series with terms dependent upon extrinsic facts in accordance with the contemporaneously adopted section 120(11), discussed above in the comments to that section. A classic example of such terms would be dividend rates varying according to an external index.

Finally on section 601, subsection (5) allows the terms of any class or series to vary among its holders, so long as any such variations are expressly described in the articles. The example in the Official Comment is "a provision that shares held by a bank or bank holding company in excess of a certain percentage would not have voting rights." More typical examples would seem to be variable-rate and auction-rate preferred stocks.

30-1-602. Terms of class or series determined by board of directors. — (1) If the articles of incorporation so provide, the board of directors is authorized, without shareholder approval, to:

(a) Classify any unissued shares into one (1) or more classes or into one (1) or more series within a class;

(b) Reclassify any unissued shares of any class into one (1) or more classes or into one (1) or more series within one (1) or more classes; or

(c) Reclassify any unissued shares of any series of any class into one (1) or more classes or into one (1) or more series within a class.

(2) If the board of directors acts pursuant to subsection (1) of this section, it must determine the terms, including the preferences, rights and limitations, to the same extent permitted under section 30-1-601, Idaho Code, of:

(a) Any class of shares before the issuance of any shares of that class; or

(b) Any series within a class before the issuance of any shares of that series.

(3) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment setting forth the terms determined under subsection (1) of this section.

History.

I.C., § 30-1-602, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 5, p. 907.

ABA OFFICIAL COMMENT

Section 602 permits the board of directors, if authority to do so is contained in the articles, to fix the terms of a class or series of shares or of a series of shares within a class to meet corporate needs, including current requirements of the securities markets or the exigencies of negotiations for acquisition of other corporations or properties, without the necessity of holding a shareholders' meeting to amend the articles. This section therefore permits prompt action and gives desirable flexibility. The articles of incorporation may also create "series" of shares within a class (rather than designating that "series" as a separate class).

The board of directors may create new series within a class. The board may also set the terms of a class or series if there are no outstanding shares of that class or series. In some contexts there is no substantive difference between a "class" and a "series within a class." Labels are often a matter of convenience.

Shares that are authorized by the articles to be issued in different classes or series with terms to be set by the board of directors are sometimes referred to as "blank check stock." The power to make the terms of "blank check stock" dependent on facts objectively ascertainable outside the articles and to vary the terms of "blank check stock" among holders of the same class or series extends to all the permitted variables set forth in section 601(3).

The granting of authority to create and set the terms for new classes and series of shares permits the board of directors to adjust the capital structure of the corporation without the time and expense of shareholder approval. This power is often used to create classes or series of preferred shares with fixed terms established in light of current market conditions or transactional needs. It is also used in connection with the issuance of so-called variable-rate or auction-rate preferred stock, i.e., stock with a dividend rate that varies according to an extrinsic referent such as the London Inter-bank Offered Rate, the prime commercial rate established by a bank or even the bids of prospective buyers of the stock as submitted from time to time and accepted by the corporation. This flexibility permits the corporation to respond to evolving market conditions and other time-sensitive developments.

Subsections (1) and (2) make it clear that the board has the same broad flexibility with regard to setting the terms of a class or series under this section as is permitted under 601(3).

Subsection (3) requires a simple filing to amend the articles so there will be a public record of the class or series which the corporation intends to issue. The amendment does not require shareholder action. See section 1005(8).

IDAHO REPORTER'S COMMENT

Pre-1997 section 30-1-16 limited the power of the board to establish specific variations of "series" of shares within a "class" of shares. The 1997 enactment of section 602 removed this prior limit and also added the power of the board to set the terms of "classes" of shares themselves. There were also numerous stylistic and simplifying changes made in the statutory language in 1997. Overall, these changes provided for greater board flexibility in these matters.

The 2004 changes to section 602 and its Official Comment most significantly modernize the Model Act approach to the issuance of "blank check stock." More specifically, old subsections (1), (2) and (3) were consolidated into subsections (1) and (2) and amended to broaden the ability of

the articles to give the board authority, without any shareholder approval, to allocate authorized but unissued shares of one class or series to other designated classes or series. Finally, old subsection (4) became (3) and was amended to simplify the articles amendment filing process.

30-1-603. Issued and outstanding shares. — (1) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted or cancelled.

(2) The reacquisition, redemption or conversion of outstanding shares is subject to the limitations of subsection (3) of this section and to section 30-1-640, Idaho Code.

(3) At all times that shares of the corporation are outstanding, one (1) or more shares that together have unlimited voting rights and one (1) or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.

History.
I.C., § 30-1-603, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 603 permits the corporation to issue shares up to the number of shares authorized in the articles of incorporation and provides that shares that are issued are outstanding shares for purposes of this Act until they are reacquired, redeemed, converted, or canceled. The determination of the number of shares to be issued is usually made by the board of directors but may be reserved by the articles of incorporation to the shareholders. The only requirements are that no class of shares be overissued and that one or more shares of a class or classes that together have unlimited voting power and one or more shares of a class or classes that together are entitled to the net assets of the corporation upon dissolution at all times must be outstanding.

Shares of any class that are outstanding may be made subject to share transfer restrictions that may result in contractual obligations by the corporation to reacquire shares. The validity of such share transfer restriction is today not open to serious question. See section 627. The corporation may also acquire outstanding shares of any class pursuant to a voluntary transaction between the shareholder and the corporation. All contractual or voluntary reacquisitions are subject to the restrictions set forth in subsection (3) of this section and to section 640. The corporation may also reacquire shares pursuant to a right of redemption (or an obligation to redeem) established in the articles of incorporation. See section 601(3)(b). All such redemptions of shares are also subject to the restrictions of subsection (3) of this section and to section 640. Shares of the class or classes described in section 601(2) may be reacquired or redeemed by the corporation in any of the foregoing ways to the same extent as shares of any other class, subject, however, to the overriding requirement of section 603(3) that at all times at least shares that meet the requirements of section 601(2) be outstanding.

The provisions of the revised Model Act are consistent with the specialized class of corporation known as the open-end investment company, which permits unlimited redemptions of shares at net asset value at the request of shareholders. Sections 601 and 603 permit the classes of shares with voting and dissolution rights to be made redeemable without limitation. The requirement of section 603(3) that at least one share be outstanding is also consistent with an unlimited right of redemption since that section only applies while there are shares of stock outstanding. If an open-end investment company or any other corporation should redeem all of its outstanding shares, it should file articles of dissolution under part 14 at or before the time the last share is redeemed.

IDAHO REPORTER'S COMMENT

This is an entirely new section designed to put into a single section principles implicit in earlier Model Act provisions (such as our existing provisions) regarding the issuance and reacquisition of shares.

30-1-604. Fractional shares. — (1) A corporation may:

(a) Issue fractions of a share or pay in money the value of fractions of a share;

(b) Arrange for disposition of fractional shares by the shareholders;

(c) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(2) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by section 30-1-625(2), Idaho Code.

(3) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(4) The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including:

(a) That the scrip will become void if not exchanged for full shares before a specified date; and

(b) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

History.

I.C., § 30-1-604, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Fractional shares may arise from a share dividend that, as applied to a particular holder, does not produce an even multiple of shares; they may also result from fractional stock splits, from reverse splits, and from reclassifications and mergers. Although corporations are authorized to issue fractional shares, which are vested proportionately with the same rights as full shares, the creation of fractional shares often creates administrative difficulties, particularly for voting and dividend purposes.

Section 604 authorizes handling fractional shares in various ways, including:

(1) The corporation may issue scrip instead of fractional shares. Scrip confers none of the substantive rights of shareholders, but only authorizes holders to combine scrip certificates in amounts aggregating a full share and then to exchange them for a full share. This aggregation must occur within the time and subject to the conditions set initially by the board of directors and stated in the scrip certificate. Scrip that is not combined and exchanged becomes void. To protect shareholders against forfeiture of their interest, however, it is usually provided that the shares represented by scrip certificates not exchanged by the expiration date are to be sold and the proceeds held, either indefinitely or for a stated period, for the benefit of the scripholders and paid to them on surrender of their scrip certificate.

Scrip has been widely used in lieu of fractional shares. The New York Stock Exchange, while not requiring the use of any particular method for the settlement of fractional share interests, has established a policy relating to the minimum rights and privileges that scrip issued by registered companies must provide. N.Y.S.E. LISTED COMPANY MANUAL § 703.02(B).

(2) The corporation may authorize the immediate sale of all fractional share interests, thereby avoiding the expense and delay of scrip and the inconvenience of recognizing fractional shares. While this procedure denies shareholders the benefit of any subsequent rise in the market, it protects them against any subsequent decline and ensures them of recognition based on market values contemporaneous with the transaction. Since these transactions necessarily involve less than one full share for each shareholder, the amount involved in subsequent price changes is usually modest.

One variation of "going private" transactions to eliminate public shareholders in a corporation largely owned by management interests involves a reverse share split at a ratio that reduces all public shareholders' interest to a fractional share, followed by the reduction of the fractional interests to cash under this section. See "Guidelines on Going Private," 37 BUS. LAW. 313 (1981).

Under this section fractional shares may be certificated or uncertificated. There is no difference in treatment of certificated or uncertificated shares for this purpose. See sections 625 and 626.

IDAHO REPORTER'S COMMENT

New section 604(1)(a) combines two provisions that appeared as separate alternatives in prior I.C. § 30-1-24 in order to make it clear that the option to pay the fair value of fractional shares (when the persons entitled to the fractional shares are determined) is an alternative to the issuance of the fractional shares themselves. Section 604(2) is a new subsection designed to ensure that the rights of holders of scrip are known to persons acquiring those interests. Section 604 also makes organizational and stylistic changes from prior I.C. § 30-1-24 but no other substantive changes.

30-1-605 — 30-1-619. [Reserved.]

30-1-620. Subscription for shares before incorporation. — (1) A subscription for shares entered into before incorporation must be in writing and is irrevocable for six (6) months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.

(2) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

(3) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement, provided that such consideration meets the requirements of section 30-1-621(2), Idaho Code.

(4) If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid for more than twenty (20) days after the corporation sends written demand for payment to the subscriber.

(5) A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to section 30-1-621, Idaho Code.

(6) A subscription for stock of a corporation, whether made before or after the formation of a corporation, shall not be enforceable against the subscriber or the corporation, unless in writing and signed by the party to be bound.

History.
I.C., § 30-1-620, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Agreements for the purchase of shares to be issued by a corporation are typically referred to as "subscriptions" or "subscription agreements." Section 620 deals exclusively with preincorporation subscriptions, that is, subscriptions entered into before the corporation was

formed. Preincorporation subscriptions have often been considered to be revocable offers rather than binding contracts. Since the corporation is not in existence, it cannot be a party to the agreement and the consideration established for the shares is not determined by the board of directors. While preincorporation subscriptions entered into simultaneously by several subscribers may be considered a binding contract between or among the subscribers, not all factual situations lend themselves to contractual analysis. Because of the uncertainty of the legal enforceability of these transactions, section 620 provides a simple set of legal rules applicable to the enforcement of preincorporation subscriptions by the corporation after its formation. It does not address the extent to which preincorporation subscriptions may constitute a contract between or among subscribers, and other subscribers may enforce whatever contract rights they have without regard to section 620.

Section 620(1) provides that preincorporation subscriptions are irrevocable for six months unless the subscription agreement provides that they are revocable or that they are irrevocable for some other period. Nevertheless, all the subscribers to shares may agree at any time that a subscriber may withdraw in part from his commitment to subscribe for shares, that a subscriber may revoke his subscription entirely, or that the period of irrevocability may continue for an additional stated period. If the corporation accepts the subscription during the period of irrevocability, the subscription becomes a contract binding on both the subscribers and the corporation. The terms of this contract are set forth in sections 620(2) and (4).

Section 620(2) provides that after incorporation the board of directors may determine the payment terms of subscriptions but these calls must be uniform so far as practicable as to all shares of the same class or series unless the subscriptions provide otherwise. Section 620(4) provides alternative methods of enforcement of preincorporation subscriptions by the corporation. If the consideration for the subscription involves the payment of money or conveyance of property, the corporation may, in the event of nonpayment, collect the amount due as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may resell the shares after 20 days' notice to the subscriber.

Section 620(3) provides that shares issued pursuant to preincorporation subscriptions are fully paid and nonassessable when the corporation receives the subscription price. The liability of the subscriber to pay the purchase price is addressed in section 622. Section 620 does not address the liability of transferees of shares which may be issued before the subscription price is paid or the power of the corporation to cancel for nonpayment shares that have been issued before payment of the full subscription price. Issued shares represented by unpaid subscriptions are subject to cancellation for nonpayment to the same extent as shares issued for promissory notes or shares issued before the consideration therefor is paid. See the Official Comment to sections 621 and 622.

Postincorporation subscriptions are the contracts between the corporation and the investor by which the corporation agrees to issue shares for a stated consideration and the investor agrees to purchase the shares for the consideration. Postincorporation subscriptions are simple contracts subject to the power of the board of directors and they may contain any mutually acceptable provisions subject to section 621. Section 620(5) states, for completeness, that postincorporation subscriptions are contracts between the corporation and the subscriber subject to section 621.

IDAHO REPORTER'S COMMENT

For a variety of reasons, the classic old method of raising capital for a new venture by preincorporation subscriptions has become largely anachronistic. The reality today is that corporations are hardly ever financed by subscriptions. Nevertheless, it is generally agreed that there is a need for some provision.

There appear to be four distinctions between prior I.C. § 30-1-17 and Official Text Model Act Section 620:

(1) Idaho § 17 required a writing; the Official Text Model Act does not. We have retained the writing requirement in new subsection (1).

(2) Model Act Section 620(2) clarifies that the requirement that calls for payment to be uniform is not applicable where the subscription agreement specifies terms for payment.

(3) Section 620(3) was added to make it clear that the shares issued pursuant to preincorporation subscriptions are fully paid and nonassessable when the consideration provided for in the subscription agreement is paid. We added the proviso to the Official Text

(4) Section 620(5) specifically recognizes that post-incorporation subscriptions are enforceable to the same extent as any other contract and are subject to the principles of section 621.

Finally, to emphasize the writing requirement, we added to the Official Text new subsection (6).

30-1-621. Issuance of shares. — (1) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(2) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property, including cash, promissory notes, services performed, or other securities of the corporation.

(3) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid and nonassessable.

(4) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(5) The corporation may place in escrow shares issued for a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the note is paid. If the note is not paid, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

(6)(a) An issuance of shares or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, requires approval of the shareholders, at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the matter exists, if:

(i) The shares, other securities, or rights are issued for consideration other than cash or cash equivalents; and

(ii) The voting power of shares that are issued and issuable as a result of the transaction or series of integrated transactions will comprise more than twenty (20) percent of the voting power of the shares of the corporation that were outstanding immediately before the transaction.

(b) In this subsection:

(i) For purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares shall be the greater of:

(A) The voting power of the shares to be issued; or

(B) The voting power of the shares that would be outstanding after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued.

(ii) A series of transactions is integrated if consummation of one (1) transaction is made contingent on consummation of one (1) or more of the other transactions.

History.

I.C., § 30-1-621, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 6, p. 907.

ABA OFFICIAL COMMENT

The financial provisions of the Model Act reflect a modernization of the concepts underlying

the capital structure and limitations on distributions of corporations. This process of modernization began with amendments in 1980 to the 1969 Model Act that eliminated the concepts of "par value" and "stated capital," and further modernization occurred in connection with the development of the revised Act in 1984. Practitioners and legal scholars have long recognized that the statutory structure embodying "par value" and "legal capital" concepts is not only complex and confusing but also fails to serve the original purpose of protecting creditors and senior security holders from payments to junior security holders. Indeed, to the extent security holders are led to believe that it provides this protection, these provisions may be affirmatively misleading. The Model Act has therefore eliminated these concepts entirely and substituted a simpler and more flexible structure that provides more realistic protection to these interests. Major aspects of this new structure are:

(1) the provisions relating to the issuance of shares set forth in this and the following sections;

(2) the provisions limiting distributions by corporations set forth in section 640 and discussed in the Official Comment to that section; and

(3) the elimination of the concept of treasury shares described in the Official Comment to section 631. [NOTE: Idaho has not eliminated the concept of treasury shares. See IDAHO REPORTER'S COMMENT to section 631.]

1. CONSIDERATION.

Section 621 incorporates not only the elimination of the concepts of par value and stated capital from the Model Act in 1980 but also eliminates the earlier rule declaring certain kinds of property ineligible as consideration for shares. The caption of the section, "Issuance of Shares by the Board of Directors," reflects the change in emphasis from imposing restrictions on the issuance of shares to establishing general principles for their issuance. The section replaces two sections captioned, respectively, "Consideration for Shares" (section 18) and "Payment for Shares" (section 19) in the 1969 Model Act (prior I.C. §§ 30-1-18 and 19).

Since shares need not have a par value, under section 621 there is no minimum price at which specific shares must be issued and therefore there can be no "watered stock" liability for issuing shares below an arbitrarily fixed price. The price at which shares are issued is primarily a matter of concern to other shareholders whose interests may be diluted if shares are issued at unreasonably low prices or for overvalued property. This problem of equality of treatment essentially involves honest and fair judgments by directors and cannot be effectively addressed by an arbitrary doctrine establishing a minimum price for shares such as "par value" provided under older statutes.

2. BOARD DETERMINATION OF ADEQUACY.

ABA Official Text section 621(2) specifically validates contracts for future services (including promoters' services), promissory notes, or "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares. [NOTE: Idaho Const., Art XI, § 9, limits consideration for shares to "labor done, services performed, or money or property actually received." New I.C. § 30-1-621 (2) therefore does not include the following ABA Official Text language: ". . . or benefit to the corporation . . . contracts for services to be performed . . ."] The term "benefit" should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation or as a prize in a promotion. In the realities of commercial life, there is sometimes a need for the issuance of shares for contract rights or such intangible property or benefits. And, as a matter of business economics, contracts for future services, promissory notes, and intangible property or benefits often have value that is as real as the value of tangible property or past services, the only types of property that many older statutes permit as consideration for shares. Thus, only business judgment should determine what kind of property should be obtained for shares, and a determination by the directors meeting the requirements of section 830 to accept a specific kind of valuable property for shares should be accepted and not circumscribed by artificial or arbitrary rules.

The issuance of some shares for cash and other shares for promissory notes, contracts for past or future services, or for tangible or intangible property or benefits, like the issuance of shares for an inadequate consideration, opens the possibility of dilution of the interests of other shareholders. For example, persons acquiring shares for cash may be unfairly treated if optimistic values are placed on past or future services or intangible benefits being provided by other persons. The problem is particularly acute if the persons providing services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors. Protection of shareholders against abuse of the power granted to the board of directors to determine that shares should be issued for intangible property or benefits is provided in part by the requirement of Section 830 in determining that the consideration received for shares is adequate, and in part by the requirement of section 1621 that the corporation must inform all shareholders annually of all shares issued during the previous year for promissory notes or promises of future services.

Accounting principles are not specified in the Model Act, and the board of directors is not required by the statute to determine the "value" of noncash consideration received by the corporation (as was the case in earlier versions of the Model Act). In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under section 621. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration.

Section 621 also does not require that the board of directors determine the value of the consideration to be entered on the books of the corporation, though the board of directors may do so if it wishes. Of course, a specific value must be placed on the consideration received for the shares for bookkeeping purposes, but bookkeeping details are not the statutory responsibility of the board of directors. The statute also does not require the board of directors to determine the corresponding entry on the right-hand side of the balance sheet under owner's equity to be designated as "stated capital" or be allocated among "stated capital" and other surplus accounts. The corporation, however, may determine that the shareholders' equity accounts should be divided into these traditional categories if it wishes.

The second sentence of section 621(3) describes the effect of the determination by the board of directors that consideration is adequate for the issuance of shares. That determination, without more, is conclusive to the extent that adequacy is relevant to the question whether the shares are validly issued, fully paid, and nonassessable. Section 621(4) provides that shares are fully paid and nonassessable when the corporation receives the consideration for which the board of directors authorized their issuance. Whether shares are validly issued may depend on compliance with corporate procedural requirements, such as issuance within the amount authorized in the articles of incorporation or holding a directors' meeting upon proper notice and with a quorum present. The Model Act does not address the remedies that may be available for issuances that are subject to challenge. This somewhat more elaborate clause replaces the provision in earlier versions of the Model Act and many state statutes that the determination by the board of directors of consideration for the issuance of shares was "conclusive in the absence of fraud in the transaction."

Shares issued pursuant to preincorporation subscriptions are governed by section 620 and not this section.

The revised Model Act does not address the question whether validly issued shares may thereafter be canceled on the grounds of fraud or bad faith if the shares are in the hands of the original shareholder or other persons who were aware of the circumstances under which they were issued when they acquired the shares. It also leaves to the Uniform Commercial Code other questions relating to the rights of persons other than the person acquiring the shares from the corporation. See the Official Comment to section 622.

ABA Official Text section 621(5) permits the board of directors to determine that shares issued for promissory notes or for contracts for future services or benefits [NOTE: New I.C. § 30-1-621(5) limits this provision to shares issued for promissory notes. Again, Idaho Const., Art. XI, § 9, does not permit issuance of shares for contracts for future services or for just any benefits.] be placed in escrow or their transfer otherwise restricted until the services are performed, the benefits received, or the notes are paid. The section also defines the rights of the corporation with respect to these shares. If the shares are issued without being restricted as provided in this subsection, they are validly issued insofar as the adequacy of consideration is concerned. See section 622 and its Official Comment.

Section 621(1) provides that the powers granted to the board of directors by this section may be reserved to the shareholders by the articles of incorporation. No negative inference should be drawn from section 621(1) with respect to the efficacy of similar provisions under other sections of the Model Act.

3. SHAREHOLDER APPROVAL REQUIREMENT FOR CERTAIN ISSUANCES. Section 621(6) provides that an issuance of shares or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, for consideration other than cash or cash equivalents, requires shareholder approval if either the voting power of the shares to be issued, or the voting power of the shares into which those shares and other securities are convertible and for which any rights to be issued are exercisable, will comprise more than 20 percent of the voting power outstanding immediately before the issuance. Section 621(6) is generally patterned on New York Stock Exchange Listed Company Manual Rule 312.03, American Stock Exchange Company Guide Rule 712(b), and NASDAQ Stock Market Rule 4310(c)(25)(H)(i). The calculation of the 20 percent compares the maximum number of votes entitled to be cast by the shares to be issued or that could be outstanding after giving effect to the conversion of convertible securities and the exercise of rights being issued, with the

actual number of votes entitled to be cast by outstanding shares before the transaction. The test tends to be conservative: The calculation of one part of the equation, voting power outstanding immediately before the transaction, is based on actual voting power of the shares then outstanding, without giving effect to the possible conversion of existing convertible shares and securities and the exercise of existing rights. In contrast, the calculation of the other part of the equation-voting power that is or may be outstanding as a result of the issuance-takes into account the possible future conversion of shares and securities and the exercise of rights to be issued as part of the transaction.

In making the 20 percent determination under this subsection, shares that are issuable in a business combination of any kind, including a merger, share exchange, acquisition of assets, or otherwise, on a contingent basis are counted as shares or securities to be issued as a result of the transaction. On the other hand, shares that are issuable under antidilution clauses, such as those designed to take account of future share splits or share dividends, are not counted as shares or securities to be issued as a result of the transaction, because they are issuable only as a result of a later corporate action authorizing the split or dividend. If a transaction involves an earn-out provision, under which the total amount of shares or securities to be issued will depend on future earnings or other performance measures, the maximum amount of shares or securities that can be issued under the earn-out shall be included in the determination.

If the number of shares to be issued or issuable is not fixed, but is subject to a formula, the application of the test in section 621(6)(b)(i) requires a calculation of the maximum amount that could be issued under the formula, whether stated as a range or otherwise, in the governing agreement. Even if ultimate issuance of the maximum amount is unlikely, a vote will be required if the maximum amount would result in an issuance of more than 20 percent of the voting power of shares outstanding immediately before the transaction.

Shares that have or would have only contingent voting rights when issued or issuable are not shares that carry voting power for purposes of the calculation under section 621(6).

The vote required to approve issuances that fall within section 621(6) is the basic voting rule under the Act, set forth in section 725, that more shares must be voted in favor of the issuance than are voted against. This is the same voting rule that applies under part 10 for amendments of the articles of incorporation, under part 11 for mergers and share exchanges, under part 12 for a disposition of assets that requires shareholder approval, and under part 14 for voluntary dissolution. The quorum rule under section 621(6) is also the same as the quorum rule under parts 10, 11, 12, and 14: there must be present at the meeting at least a majority of the votes entitled to be cast on the matter.

Section 621(6) does not apply to an issuance for cash or cash equivalents, whether or not in connection with a public offering. "Cash equivalents," within the meaning of section 621(6), are short-term investments that are both readily convertible to known amounts of cash and present insignificant risk of changes in interest rates. Generally, only investments with original maturities of three months or less or investments that are highly liquid and can be cashed in at any time on short notice could qualify under these definitions. Examples of cash equivalents are types of Treasury Bills, investment grade commercial paper, and money-market funds. Shares that are issued partly for cash or cash equivalents and partly for other consideration are "issued for consideration other than cash or cash equivalents" within the meaning of section 621(6).

The term "rights" in section 621(6) includes warrants, options, and rights of exchange, whether at the option of the holder, the corporation, or another person. The term "voting power" is defined in section 140(27) as the current power to vote in the election of directors. See also the Comment to that subsection. Transactions are integrated within the meaning of section 621(6) where consummation of one transaction is made contingent on consummation of one or more of the other transactions. If this test is not satisfied, transactions are not integrated for purposes of section 621(6) merely because they are proximate in time or because the kind of consideration for which the corporation issues shares is similar in each transaction.

Section 621(6) only applies to issuances for consideration. Accordingly, like the Stock Exchange and NASDAQ rules on which section 621(6) is based, section 621(6) does not require shareholder approval for share dividends (which includes "splits") or for shareholder rights plans. See section 623 and the official Comment thereto.

Illustrations of the application of section 621(6) follow:

1. C corporation, which has 2 million shares of Class A voting common stock outstanding (carrying one vote per share), proposes to issue 600,000 shares of authorized but unissued shares of Class B non-voting common stock in exchange for a business owned by D Corporation. The proposed issuance does not require shareholder approval under section 621(6), because the Class B shares do not carry voting power.

2. The facts being otherwise as stated in Illustration 1, C proposes to issue 600,000 additional shares of its Class A voting common stock. The proposed issuance requires

shareholder approval under section 621(6), because the voting power carried by the shares to be issued will comprise more than 20 percent of the voting power of C's shares outstanding immediately before the issuance.

3. The facts being otherwise as stated in Illustration 1, C proposes to issue 400,000 shares of authorized but unissued voting preferred, each share of which carries one vote and is convertible into 1.5 shares of Class A voting common. The proposed issuance requires shareholder approval under section 621(6). Although the voting power of the preferred shares to be issued will not comprise more than 20 percent of the voting power of C's shares outstanding immediately before the issuance, the voting power of the shares issuable upon conversion of the preferred will carry more than 20 percent of such voting power.

4. The facts being otherwise as stated in Illustration 1, C proposes to issue 200,000 shares of its Class A voting common stock, and 100,000 shares of authorized but unissued nonvoting preferred stock, each share of which is convertible into 2.5 shares of C's Class A voting common stock. The proposed issuance requires shareholder approval under section 621(6), because the voting power of the Class A shares to be issued, after giving effect to the common stock that is issuable upon conversion of the preferred, would comprise more than 20 percent of the voting power of C's outstanding shares immediately before the issuance.

5. The facts being otherwise as stated in Illustration 1, C proposes to acquire businesses from Corporations G, H, and I, for 200,000, 300,000, and 400,000 shares of Class A voting common stock, respectively, within a short period of time. None of the transactions is conditioned on the negotiation or completion of the other transactions. The proposed issuance of voting shares does not require shareholder approval, because the three transactions are not integrated within the meaning of section 621(6), and none of the transactions individually involves the issuance of more than 20 percent of the voting power of C's outstanding shares immediately before each issuance.

IDAHO REPORTER'S COMMENT

Note: Much of the following discussion is taken largely verbatim from the annotated Model Act's "Historical Background" annotation to section 621. Your Idaho reporter has both modified and added to the annotation. The length of this particular COMMENT is deemed justified by the significance of the changes involved in this area.]

1. General Historical Background. The concept of "par value" or "stated value" for shares [which is eliminated under this new Act] is apparently as old as the concept of shares in commercial enterprises. All early charters and general corporation laws assumed that the corporation would receive money as consideration for shares equal to the par value or stated value of the shares. At a relatively early time, "money's worth" became an acceptable substitute for cash; as stated by Lord Justice Giffard in *Drummond's Case*, L.R. 4 Ch. 772, 779, 18 W.L.R. 2, 21 L.T.R. 317, 319 (1869): "If a man contract to take shares he must pay for them, to use a homely phrase, in meal or in malt; he must either pay in money or in money's worth. If he pays in one of the other, that will be a satisfaction." General incorporation statutes after 1850 usually specified that shares could be issued for property as well as money; services actually performed were included as acceptable consideration shortly thereafter.

During the latter part of the 19th century, the issuance of shares for less than the "par" or "stated" value was viewed as a serious evil and the cause of widespread fraud and speculation. Often described as "watered" shares, the issuance of par values shares for less than par value was viewed as potentially misleading to creditors and shareholders.

By far the most common cause of creation of "watered stock" was the issuance of shares for overvalued property or services rather than cash. Because each item of consideration must be translated into dollars for balance sheet purposes, the valuation of property and services was considered to be central in determining whether full consideration was received for shares. Creditors were the chief complainants in the so-called "watered stock" cases that arose in the late 19th and early 20th centuries; it was accepted that creditors relied on the balance sheet, which was viewed as a public representation of the capital invested in the corporation. In modern times, creditor grievances are less common, partially due to state blue-sky laws and the Securities Act of 1933 and partially due to changes in credit investigation techniques that do not rely on the corporation's financial statements. Property and services valuation continues to be important, however, to existing shareholders whose interests may be diluted by overvalued consideration for shares issued to new shareholders.

Early common law cases adopted a "true value" rule for determining whether shares were "watered." Under this rule, the value of the property received must actually equal the par value of the issued shares; the question was not whether the shareholders or the directors believed, or had reason to believe, that the property was equal in value to the par value of the capital

shares, but whether, in point of fact, it was the equivalent. See, e.g., *Van Cleve v. Berkey*, 143 Mo. 109, 44 S.W. 743, 42 L.R.A. 598 (1898). Although some courts rejected this harsh rule, see, e.g., *Coit v. North Carolina Gold Amalgamating Co.*, 119 U.S. 343 (1886), and it appears likely in retrospect that this rule would have been ultimately rejected on general principles, its existence became one major reason for the codification of the capitalization statutes.

Even with the broadening of the eligible consideration for shares to include property actually received and services actually performed as well as cash, many statutes and many cases continued to limit strictly the concept of eligible consideration. Thus, practically all states prohibited the issuance of shares for promises of future services or for promissory notes.

Idaho, e.g., like fourteen other states, has elevated the limit on eligible consideration to constitutional status. Idaho Const., Art. XI, § 9 provides:

No corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons, holding a majority of the stock of the class to be increased, first obtained at a meeting, held pursuant to such notice as is provided by the legislature.

Thus, Idaho could not adopt Official Text 621 subsections (2) (which would allow as consideration for shares "any benefit to the corporation, including . . . contracts for services to be performed") and (5)(again contemplating "shares issued for a contract for future services") verbatim. Whether a constitutional amendment is appropriate or feasible is a matter your reporter will leave to the judgment of "more political types."

Many cases qualified the idea of "property" by concluding that unpatented processes, business plans, and conditional leases or contract rights were so ephemeral, so lacking in novelty, and so generally not available for payment of creditors as not to constitute "property," thereby giving rise to liability for "watered stock" or permitting the shares issued for such consideration to be canceled.

"Par value" also served a second purpose in the structure of early corporation statutes. Since par value defined the permanent capital invested in the corporation by shareholders, it also thereby described the irreducible minimum of the corporate assets that could not be used for the payment of dividends or otherwise paid out to shareholders before satisfaction of all creditors. Although early corporate statutes phrased this restriction on dividends in various ways, the core idea was that the aggregate par value of all issued shares represented the permanent capital of the corporation that was not available for distribution.

The complexities of "par value" jurisprudence caused a number of states to adopt the innovation of "no par" value shares in the early years of the 20th century. [See, e.g., prior I.C. § 30-1-18, second paragraph.] The leading statute was enacted in New York in 1912. However, from the outset the usefulness of this innovation was limited since no par shares were fitted into the par value jurisprudence as an exception or qualification to the older practice so as to minimize its consequences. Other factors discussed below also limited the usefulness of the no par shares option.

During the early part of the 20th century, sophisticated attorneys increasingly turned to the use of nominal par value shares to provide maximum flexibility at minimal cost. [This practice has always been most strongly recommended to Univ. of Idaho College of Law students by your reporter.] Nominal par value shares were shares with a low par value (often one cent, ten cents, or one dollar per share) that were issued for several dollars or more per share. Nominal value shares offered an important tax saving over no par shares because the federal documentary tax (repealed in 1966) and the tax statutes of many states valued no par shares at the actual value or consideration for the shares while par value shares were valued at par value. Further, nominal par value shares were thought to limit exposure to watered-stock liability, particularly when property of uncertain value was the consideration for shares, since it was believed that such liability would be based on the difference between par value and the value of the property contributed. Finally, nominal par value shares maximized the flexibility of corporations making distributions in the future, since the bulk of the consideration received for the shares would not be represented by the par value of the issued shares and therefore would not become part of the permanent capital of the corporation.

2. The Model Act. The 1950 Model Act and all later revisions (until adoption of the 1980 financial amendments) generally adopted and codified the established practice of corporate finance at that time. Thus, with respect to par value shares, section 17 of the 1950 Act provided that shares having a par value may be issued for eligible consideration, "not less than the par value thereof" as may be fixed by the directors [See, e.g., prior I.C. § 30-1-18, first paragraph]; section 2(j) [prior I.C. § 30-1-2(j)] defined "stated capital" to include the "par value of all shares having a par value that have been issued;" section 19 [prior I.C. § 30-1-21, first paragraph] stated that the consideration received for shares in excess of the par value constituted capital surplus; and section 23 [prior I.C. § 30-1-25, first paragraph] provided that a holder of or

subscriber for shares had no obligation to the corporation or its creditors "other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued."

With respect to no par shares, section 17 [prior I.C. § 30-1-18, second paragraph] provided that these shares could be issued for the consideration established by the directors (or shareholders); section 19 [prior I.C. § 30-1-21, second paragraph] provided that the consideration received for no par shares constituted stated capital except that the board could, within 60 days, transfer up to 25 percent of that consideration to capital surplus; and section 2(j) [prior I.C. § 30-1-2(j)] defined stated capital to include the amount received as consideration for no par shares except that part of the consideration which was lawfully allocated to capital surplus. In 1960, section 19 [prior I.C. § 30-1-21, second paragraph] was amended to eliminate the 25 percent requirement and permit "any part" of the consideration for no par shares to be allocated to capital surplus.

Section 18 of the 1950 Act [prior I.C. § 30-1-19, first paragraph] continued the common law restrictions on the types of eligible consideration by providing that consideration for shares may be paid "in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation." The second paragraph provided that "neither promissory notes nor future services shall constitute payment or part payment, for shares of a corporation." The last paragraph of section 18 [prior I.C. § 30-1-19, third paragraph] attempted to reverse the common law "true value" rule by providing that "in the absence of fraud in the transaction" the judgment as to the value of consideration received "shall be conclusive."

The stated capital-surplus distinction partially set out in section 19 of the 1950 Act [prior I.C. § 30-1-21] was fleshed out by an elaborate set of definitions in section 2 of the Act. The following terms were defined: "net assets" (section 2(i)), "stated capital" (section 2(j)), "surplus" (section 2(k)), "earned surplus" (section 2(e)), and "capital surplus" (section 2(m)).

Sections 5 [prior I.C. § 30-1-6], 40 [prior I.C. § 30-1-45] and 41 [prior I.C .§ 30-1-46] of the 1950 Act contained elaborate rules, based on the definitions of surplus in section 2, as to the use of surplus for distribution to shareholders. While section 40 [prior I.C. § 30-1-45] limited dividends to "earned surplus," this protection of the capital of the corporation was to some extent illusory since section 5 [prior I.C. § 30-1-6] permitted capital surplus to be used for the redemption of shares with the consent of two-thirds of the shareholders and section 41 [prior I.C. § 30-1-46] permitted distributions "in partial liquidation out of stated capital or capital surplus" again with approval of two-thirds of the shareholders. The major restriction in practice on these capital distributions was that they could not be made if the corporation was or would be rendered "insolvent," a term defined in section 2(n) to mean unable to "pay its debts as they became due in the usual course of its business." In subsequent revisions of the Model Act before 1980, changes were made in the rules with respect to permissible distributions; these changes, if anything, complicated rather than simplified the statute. In the 1969 revision, for example, the Model Act authorized the following use of surplus:

Purpose of distribution	**Eligible surplus**
Dividends	Earned Surplus
Redemption of shares	Earned Surplus; capital surplus (with approval of majority of shares)
Distribution of Capital	Capital surplus (with approval of majority of shares)
Elimination of deficit in earned surplus	Capital surplus
Miscellaneous (paying arrearages in preferred shares dividends; eliminating fractional shares; paying dissenting shareholders)	Earned surplus; capital surplus; stated capital

Two other factors further weakened this elaborate structure. The Model Act never imposed a requirement that any minimum amount of stated capital had to be paid in. Although section 51 of the 1950 Act required that $1000 of capital in the aggregate be paid in, that requirement was phrased in terms of "consideration of the value of at least one thousand dollars," so that capital surplus could count toward the $1000 minimum. The $1000 minimum was itself eliminated in 1960. Second, even if a corporation had significant amounts of stated capital, the Model Act permitted its reduction or elimination by the simple process of amending the articles of incorporation to reduce the par value of outstanding shares (section 55(b) of the 1950 Act) [prior I.C. § 30-1-58(e)], by reacquiring outstanding par value shares and canceling them

(section 61):prior I.C. § 30-1-68], or by simply reducing stated capital represented by no par shares by corporate action (section 62) [prior I.C. § 30-1-69]. Stated capital reduced by one or more of these devices became capital surplus (section 70). Furthermore, these changes could be made by shareholder action without approval of creditors.

Given these exceedingly complex rules with various escape valves it is not surprising that creditors eventually realized that the elaborate statutory rules about the capitalization of a corporation did not provide them meaningful protection against distributions to shareholders that may impair the security of their position. As a result, sophisticated creditors negotiated contractual restrictions on the distribution of assets to shareholders.

The financial provisions of the Model Act were completely revised in 1980. In this revision it was recognized that the effective restriction on distributions imposed by the Model Act was the prohibition against distributions made while the corporation was insolvent or that would render the corporation insolvent. That is the starting point for the 1984 Model Act. In view of the major changes made in 1980 and 1984, a detailed analysis of changes before that date would serve little purpose.

Section 621 incorporates the 1980 revision, but the Official Text also makes a major further substantive change: it eliminates the rule that only certain limited types of consideration — cash, property actually received, or services actually rendered — may serve as the basis for the issuance of shares. This change was under consideration by a subcommittee of the ABA Committee on Corporate Laws when the revision process began but was not separately published for comment. The Exposure Draft published in 1983 dealt only with promissory notes and promises for future services; the 1984 Model Act is considerably broader in accepting intangible benefits as consideration for the issue of shares. As noted above in part 1 of this COMMENT, Idaho cannot make this change because of the limits of Idaho Const., Art. XI, § 9, and has therefore modified the Official Text of section 621 (2) and (5) accordingly. In addition, the Revised Model Act significantly revises the prior statutory language relating to the role of directors in establishing the consideration for shares to be issued and when shares are fully paid and nonassessable. These provisions were developed during the systematic review of the financial provisions of the Revised Model Act following the publication of the Exposure Draft in 1983.

3. The Particular Idaho Problem with Nonassessable Shares. Like its Model Act predecessor, new section 621(4) makes no provision for assessable shares. At the time of our 1979 revision, it was determined that the use of assessable shares was important to many Idaho corporations, primarily mining companies. As a result, we added to the basic Model Act package prior I.C. § 30-1-19A. Reproduced below in its entirety is the "COMMENT" on prior I.C. § 30-1-19A by the bar committee to the Legislature in connection with the 1979 revision.

> COMMENT: Model Act Section Nineteen makes no provision for assessable shares. The use of assessable shares is important to many Idaho corporations; therefore, provision for the device must be made in the new Idaho Business Corporation Act. Under existing I.C. § 30-157, shares of an Idaho Corporation are assessable unless provision is made in the Articles of Incorporation that the shares are not subject to assessment. In addition, existing I.C. § 30-157 provides a detailed procedure for assessment and for selling of delinquent shares which is designed to provide limitations on assessment and notice to shareholders of assessment and of the selling of shares due to a delinquency.

In providing for assessable shares in the new Idaho Business Corporation Act, Model Act Section Nineteen has been amended and Section Nineteen (A) has been added to set forth the procedure for assessment and for sale of stock upon delinquency. Different provisions apply to corporations formed after the effective date of the Act and those formed before that date in order to reconcile the need to reform the assessment provisions with the preservation of rights granted to existing corporations.

In the case of corporations organized after the effective date of the Idaho Business Corporation Act, the assessable shares will be permitted, but provisions for assessable shares must be made in the Articles of Incorporation and the fact of assessability must be stated conspicuously upon the share certificates themselves. These requirements provide for notice to shareholders of the assessability provision and eliminate a possible trap for the unwary found in the present Idaho Code since the majority of corporations probably have no intention of making their stock assessable.

A corporation organized prior to the effective date of the Idaho Business Corporation Act can continue to retain the assessability feature without a provision in its Articles or a designation on its existing and outstanding shares. When an existing corporation issues new shares or receives existing shares upon transfer for re-issue, the legend will at that time be placed on the shares. While not completely satisfactory in terms of providing notice to shareholders, the need for such a provision is clear. First, it would be impossible for existing corporations to recall all outstanding certificates evidencing assessable shares and reissue them with the legend.

Further, corporations existing before the enactment of the new Idaho Business Corporation Act have issued assessable shares in reliance upon existing law. Forcing an existing corporation to amend its Articles of Incorporation to provide for assessable stock or lose the right to make assessments in the future would be cumbersome and unworkable both for the corporations involved and the Secretary of State's office. Many small corporations might not become aware of the requirement and would unknowingly lose the right to make assessments if challenged in the future. This factor might well make such a requirement unconstitutional.

The detailed provisions of Section 30-1-19A apply to all future assessments and sale of shares upon delinquency. These provisions are taken with very few changes from the existing I.C. 30-157. The existing section, while cumbersome, was amended recently (in 1970) and is familiar to those corporations having assessable shares. The purpose of the section is to set out a procedure for assessing shares and for sale of shares on a delinquency which provides notice to the shareholders. To this end, the existing section has been amended to provide for the mailing of a notice of sale to a delinquent shareholder as well as publication of such notice. The existing section already provides for both types of notice of the assessment itself.

It has now been determined that the use of assessable shares is no longer of any significant importance to Idaho corporations. Idaho has therefore adopted new Model Act section 621 (4) and eliminated prior I.C. § 30-1-19A's confusing and anachronistic provisions. To the extent that any Idaho Corporation deems it necessary to use stock assessment or any related device, it is the opinion of your reporter that such may be provided for by stockholder agreements. Any Idaho corporation with a provision for assessable stock existing at the effective date of this new Act shall be deemed to be operating with such an agreement in place for purposes of transition from the old to the new Act. See Idaho reporter's comment to new section 1703.

4. Summary of Changes in the Financial Provisions. Amendments adopted in 1980 [but not in Idaho until now] eliminated the traditional concepts of par value, stated capital, and treasury shares [NOTE: The traditional concept of treasury shares is retained in Idaho. See Idaho Reporter's Comment to section 631, below.] and substituted a simpler, less confusing and potentially less misleading treatment. The standards for determining the legality of distributions of all types — dividends, redemptions, or repurchases of shares, and distributions of capital — were simplified and made uniform. The test combines the familiar equity solvency test (that the corporation must be able to pay its debts as they become due after the distribution) with a balance sheet test that requires the assets of the corporation after the distribution to exceed the sum of its liabilities and the preferential amounts due on liquidation to specified senior equity interests on the basis of accounting principles that are reasonable under the circumstances (but that are not necessarily Generally Accepted Accounting Principles). The ABA committee advised the National Conference of Commissioners on Uniform State Laws of inconsistency between these financial provisions and the Uniform Fraudulent Conveyance Act, and the Commissioners are now engaged in a revision of that Act.

These provisions, as amended in 1980, were further revised substantially during the development of the Revised Model Business Corporation Act (1984). The most important change permits consideration for shares to consist of promissory notes. A requirement that all transactions involving promissory notes be reported to the shareholders has also been added.

5. Shareholder Approval Requirement for Certain Issuances. Subsection (6), added in 2004, requires shareholder, not just the usual director, approval of certain issuances of shares. It is triggered whenever shares or other securities convertible into shares are issued and (1) the consideration to be received for such securities is not cash or cash equivalents and (2) either the voting power of the shares to be issued, or of the shares into which anything issued may be converted, will add up to more than 20% of the voting power outstanding immediately before the issuance. The ABA Official Comment concludes with six (6) useful examples of subsection 30-1-621 (6) in operation. These examples do not, however, include the "triangular" merger whereby an acquiring corporation could avoid a shareholder vote by effecting the merger through a subsidiary where the subsidiary was the formal "party" to the merger. This "dodge" of the parent's shareholders will no longer work.

This provision extends to all corporations what is already required of publicly-held companies under rules of the NYSE, AMEX and NASDAQ.

30-1-622. Liability of shareholders. — (1) A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued as provided in section 30-1-621, Idaho Code, or specified in the subscription agreement as provided in section 30-1-620, Idaho Code.

(2) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.

History.
I.C., § 30-1-622, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

With the elimination of the concepts of par value and watered stock in 1980, the sole obligation of a purchaser of shares from the corporation, as set forth in section 622(1), is to pay the consideration established by the board of directors (or the consideration specified in the subscription, in the case of preincorporation subscriptions). The consideration for the shares may consist of promissory notes or tangible or intangible property, and, if the board of directors so decides, the delivery of the notes constitutes full payment for the shares. See the Official Comment to section 621. Upon the transfer to the corporation of the consideration so determined or specified, the shareholder has no further responsibility to the corporation or its creditors "with respect to the shares," though the shareholder may have continuing obligations under a promissory note entered into in connection with the acquisition of shares.

Section 622(1) deals only with the responsibility for payment by the purchaser of shares from the corporation. The revised Model Act leaves to the Uniform Commercial Code questions with respect to the rights of subsequent purchasers of shares with the power of the corporation to cancel shares if the consideration is not paid when due. See sections 8-202 and 8-301 of the UNIFORM COMMERCIAL CODE.

Section 622(2) sets forth the basic rule of nonliability of shareholders for corporate acts or debts that underlies modern corporation law. Unless such liability is provided for in the articles of incorporation, see section 202(2)(b)(v), shareholders are not liable for corporate obligations, though the last clause recognizes that such liability may be assumed voluntarily or by other conduct.

IDAHO REPORTER'S COMMENT

The first paragraph of prior I.C. § 30-1-25 is essentially restated with stylistic changes in new Model Act section 622(1).

The last three paragraphs of the 1969 Model Act version (prior I.C. § 30-1-25) were deemed by the ABA committee to be inappropriate for retention in the corporation statute. Matters involving transferee liability are covered in detail in chapter eight of the UCC, and the scope of any such liability should not be partially addressed in a different statute.

Section 622(2) is new and was added to make express the basic rule of non-liability of shareholders for corporate obligations. It should be noted, however, that section 622(2) does not exhaust the possible statutory bases for imposing liability on shareholders. These would include sections 204 (liability for preincorporation transactions), 740 (procedure in derivative proceedings) and 833 (liability for unlawful distributions). Shareholders may also possibly become liable for corporate obligations by their voluntary actions or by other conduct under the old common law doctrine of "piercing the corporate veil."

30-1-623. Share dividends. — (1) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one (1) or more classes or series. An issuance of shares under this subsection is a share dividend.

(2) Shares of one (1) class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(a) The articles of incorporation so authorize;

(b) A majority of the votes entitled to be cast by the class or series to be issued approve the issue, or

(c) There are not outstanding shares of the class or series to be issued.

(3) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend.

History.

I.C., § 30-1-623, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A share dividend is solely a paper transaction: No assets are received by the corporation for the shares and any "dividend" paid in shares does not involve the distribution of property by the corporation to its shareholders. Section 623 therefore recognizes that such a transaction involves the issuance of shares "without consideration," and section 140(6) excludes it from the definition of a "distribution." Such transactions were treated in a fictional way under the old "par value" and "stated capital" statutes, which treated a share dividend as involving transfers from a surplus account to stated capital and assumed that par value shares could be issued without receiving any consideration by reason of that transfer of surplus.

The par value statutory treatment of share dividend transactions distinguished a share "split" from a dividend. In a share "split" the par value of the former shares was divided among the new shares and there was no transfer of surplus into the stated capital account as in the case of a share "dividend." Since the Model Act has eliminated the concept of par value, the distinction between a "split" and a "dividend" has not been retained and both types of transactions are referred to simply as "share dividends." A distinction between "share dividends" and "share splits," however, continues to exist in other contexts — for example, in connection with transactions by publicly held corporations, see N.Y.S.E. LISTED COMPANY MANUAL § 703.02(a), or corporations that have optionally retained par value for their shares. The change made in the Model Act is not intended to affect the manner in which transactions by these corporations are handled or described but simply reflects the elimination of artificial legal distinctions based on the par value statutes.

A "reverse stock split" is not a share dividend under this section of the Model Act. A reverse split involves an amendment to the articles of incorporation reducing the number of authorized shares, not the issuance of additional shares.

Share dividends may create problems when a corporation has more than a single class of shares. The requirement that a share dividend be "pro rata" only applies to shares of the same class or series; if there are two or more classes entitled to receive a share dividend in different proportions, the dividend will have to be allocated appropriately.

The distribution of shares of one class to holders of another class may dilute the equity of the holders of the first class. Therefore, subsection (2) permits the distribution of shares of one class to the holders of another class only if one or more of the following conditions are met: (1) the articles of incorporation expressly authorize the transaction, (2) the holders of the class being distributed consent to the distribution, or (3) there are no holders of the class being distributed.

IDAHO REPORTER'S COMMENT

Our prior par value concept created conceptual difficulties for dividends payable in par value shares. This conceptual problem was first addressed in prior I.C. § 30-1-18, 4th paragraph, which directed that "[t]hat part of the surplus which is transferred to stated capital upon the issuance of [the] dividend shall be deemed to be the consideration for the issuance of [the new] shares." This basic direction was substantively repeated at prior I.C. § 30-1-45(d)(1). A problem with all this, however, was that accounting principles generally require that stated capital should instead be increased by the fair market value of shares issued as a dividend, and if greater than par value, by a transfer from earned surplus.

The foregoing fictional treatment of share dividends is recognized in new Model Act section 623, where elimination of the par value related concepts leads to significant simplification.

30-1-624. Share options. — (1) A corporation may issue rights, options or warrants for the purchase of shares or other securities of the corporation. The board of directors shall determine:

(a) The terms upon which the rights, options or warrants are issued; and

(b) The terms, including the consideration for which the shares or other securities are to be issued. The authorization by the board of directors for the corporation to issue such rights, options or warrants constitutes authorization of the issuance of the shares or other securities for which the rights, options or warrants are exercisable.

(2) The terms and conditions of such rights, options or warrants, including those outstanding on the effective date of this act, may include, without limitation, restrictions or conditions that:

(a) Preclude or limit the exercise, transfer or receipt of such rights, options or warrants by any person or persons owning or offering to acquire a specified number or percentage of the outstanding shares or other securities of the corporation or by any transferee or transferees of any such person or persons; or

(b) Invalidate or void such rights, options or warrants held by any such person or persons or any such transferee or transferees.

History.

I.C., § 30-1-624, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 7, p. 907.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this act" in the introductory paragraph in subsection (2) refers to the effective date of S.L. 2004, ch. 324, which was July 1, 2004.

ABA OFFICIAL COMMENT

A specific provision authorizing the creation of rights, options and warrants appears in many state business corporation statutes. Even though corporations doubtless have the inherent power to issue these instruments, specific authorization is desirable because of the economic importance of rights, options and warrants, and because it is desirable to confirm the broad discretion of the board of directors in determining the consideration to be received by the corporation for their issuance. The creation of incentive compensation plans for directors, officers, agents, and employees is basically a matter of business judgment. This is equally true for incentive plans that involve the issuance of rights, options or warrants and for those that involve the payment of cash. In appropriate cases incentive plans may provide for exercise prices that are below the current market prices of the underlying shares or other securities.

Section 624(1) does not require shareholder approval of rights, options or warrants. Of course, prior shareholder approval may be sought as a discretionary matter, or required in order to comply with the rules of national securities markets (see N.Y.S.E. Listed Company Manual section 309.00), or to acquire the federal income tax benefits conditioned upon shareholder approval of such plans (see section 422(b)(1) of the Internal Revenue Code of 1986, as amended).

Under section 624(1), the board of directors may designate the interests issued as options, warrants, rights, or by some other name. These interests may be evidenced by certificates, contracts, letter agreements, or in other forms that are appropriate under the circumstances. Rights, options, or warrants may be issued together with or independently of the corporation's issuance and sale of its shares or other securities.

Some publicly held corporations have delegated administration of programs involving incentive compensation in the form of share rights or options to compensation committees composed of nonmanagement directors, subject to the general oversight of the board of directors.

Section 624(2) is intended to clarify that the issuance of rights, options, or warrants as part of a shareholder rights plan is permitted. A number of courts have addressed whether shareholder rights plans are permitted under statutes similar to prior sections 601, 602, and

624. These courts have not agreed on whether provisions similar in language in sections 601, 602, and 624 permit such plans to distinguish between holders of the same class of shares based on the identity of the holder of the shares. However, in each of the states in which a court has interpreted a statute of that state as prohibiting such shareholder rights plans, the legislature has subsequently adopted legislation validating such plans. Section 624(2) clarifies that such plans are permitted.

The permissible scope of shareholder rights plans may, however, be limited by the courts. For example, courts have been sensitive to plans containing provisions which the courts perceive as infringing upon the power of the board of directors.

IDAHO REPORTER'S COMMENT

New Model Act section 624 makes two types of changes from its predecessor [prior I.C. § 30-1-20], one more substantive than the other.

First, and more substantively, the existing requirement for shareholder approval (two-thirds) for any stock rights or options issued only to directors, officers or employees, and not to shareholders generally, is deleted. The theory here is that the issues are a legitimate matter of business judgment for the board of directors. Idaho has struck a compromise here with the addition of the "unless" clause at the end of the new Official Text. The practical result is to empower the directors "unless" the articles otherwise provide.

Second, and less substantively, there is elimination of provisions currently providing for the following: (i) express authorization of the issuance of options independent of the acquisition of other shares by the optionees, (ii) recognition that options may be issued (as incentives) to directors, officers or employees and (iii) express provision that the decision of the board with respect to any issue of rights or options shall be conclusive in the absence of fraud. These provisions were eliminated by the ABA committee on the grounds that they were originally included because of now-obsolete concerns about the validity of certain options and that they were unnecessary, being covered by other sections of the revised Model Act.

Overall, the basic idea in this new section 624 seems to be simplification to make clear that the issuance of options is a matter for the routine business judgment of the directors.

The 2004 amendments here were useful from the perspective of updating and clarification. From the perspective of "Enron" and corporate scandal, however, these amendments were "non-responsive." Stock option abuses, both in granting and in accounting and tax treatment, have been "centerpieces" of our national "executive greed problem." Whether an isolated Idaho reform effort would be appropriate or counterproductive was debated within the Idaho Bar Committee. A strong majority of the Committee concluded that any such effort would be meaningless on the national level and counterproductive to Idaho in discouraging incorporation here.

Any reform efforts as such were obviously irrelevant to the ABA Committee in connection with its "facilitative" amendments to section 624. In general, the language dealing with setting forth the terms of rights or options in the instruments evidencing them was simplified and made even more facilitative of executive greed. Specifically, a new sentence was added in subsection (1) providing that the authorization of the board to issue options shall also constitute authorization of the issuance of the underlying shares or also now "other securities" upon exercise. And a new subsection (2) was added to confirm the validity of shareholder rights plans that include rights, options or warrants.

If the Legislature is interested in reform rather than slightly further greasing the skids for executive greed, it might rethink Idaho's pre-Model Act regime here. As mentioned above, pre-1997, I.C. §30-1-20 required shareholder approval (⅔) for any stock rights or options issued only to directors, officers or employees, and not to shareholders generally. After "Enron" et al., your reporter would argue that the issuance of options should no longer be considered a matter for the routine business judgment of corporate directors. Your reporter, however, was overwhelmingly outvoted by the other members of the Committee who strongly favored approval of this amended section.

30-1-625. Form and content of certificates. — (1) Shares may but need not be represented by certificates. Unless this chapter or another statute expressly provides otherwise, the rights and obligations of shareholders are identical whether or not their shares are represented by certificates.

(2) At a minimum each share certificate must state on its face:

(a) The name of the issuing corporation and that it is organized under the law of this state;

(b) The name of the person to whom issued; and

(c) The number and class of shares and the designation of the series, if any, the certificate represents.

(3) If the issuing corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences and limitations applicable to each class and the variations in rights, preferences and limitations determined for each series, and the authority of the board of directors to determine variations for future series, must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

(4) Each share certificate:

(a) Must be signed, either manually or in facsimile, by two (2) officers designated in the bylaws or by the board of directors; and

(b) May bear the corporate seal or its facsimile.

(5) If the person who signed, either manually or in facsimile, a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid.

History.

I.C., § 30-1-625, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

This section sets forth the minimum requirements for share certificates. A corporation whose shares are not publicly traded will normally issue certificates that meet these minimum requirements and little more. Securities that are publicly traded, on the other hand, must contain reasonable safeguards against fraudulent duplication; for this reason, regulations by exchanges contain technical requirements relating to design, workmanship, engraving, and printing. Also, exchange requirements may require signatures of a transfer agent and registrar as well as designated corporate officers. All these requirements are in addition to the minimum requirements of the Model Act.

Certificateless shares are permitted under section 625(1) upon compliance with section 626. Section 625(1) makes it clear that there are no differences in the rights and obligations of shareholders, whether or not their shares are represented by certificates, other than mechanical differences, such as the means by which instructions for transfer are communicated to the issuer, necessitated by the use or nonuse of certificates. If share transfer restrictions are imposed, conspicuous references must appear on the certificate if they are to be binding on third persons without knowledge of the restrictions. See section 627.

Under section 625 all signatures on a share certificate may be facsimiles. This change, which has been adopted recently in several states, gives recognition to the fact that a purchaser of publicly traded shares will hardly ever be in a position to determine whether a manual signature on a stock certificate is in fact the authorized signature of an officer or the transfer agent or registrar. From the standpoint of the issuing corporation of publicly traded securities, if a share certificate requiring a manual signature is stolen and the signature thereafter forged, the corporation may defend on lack of genuineness under section 8-202(3) of the UNIFORM COMMERCIAL CODE. But this defense is not effective against a bona fide purchaser when the forged signature has been placed on the certificate by an employee of the issuer or registrar or transfer agent entrusted with handling the certificates (UCC § 8-205). It is likely that a corporation would therefore follow the same security precautions for blank certificates requiring manual signatures as for those not requiring them. At the same time, the time and expense required for manual signatures has been eliminated.

IDAHO REPORTER'S COMMENT

The substantive changes here from the prior Model Act provision [prior I.C. § 30-1-23] are as follows:

(1) Whereas prior § 23 required signature by specific officers, new section 625(4) requires only signature by any two officers, to be designated in the bylaws or by the board of directors.

(2) Under prior § 23 facsimile signatures were permitted only if the certificate was countersigned by a "transfer agent" or a "registrar." New section 625(4) allows all signatures on shares certificates to be facsimile.

(3) Any required reference to par value is of course eliminated.

30-1-626. Shares without certificates. — (1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(2) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by section 30-1-625(2) and (3), Idaho Code, and, if applicable, section 30-1-627, Idaho Code.

History.
I.C., § 30-1-626, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Piercing the Corporate Veil.
Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

ABA OFFICIAL COMMENT

Section 626(1) authorizes the creation of uncertificated shares either by original issue or in substitution for shares previously represented by certificates. This subsection gives the board of directors the widest discretion so that a particular class and series of shares might be entirely represented by certificates, entirely uncertificated, or represented partly by each. The second sentence ensures that a corporation may not treat as uncertificated, and accordingly transferable on its books without due presentation of a certificate, any shares for which a certificate is outstanding.

The statement required by section 626(2) ensures that holders of uncertificated shares will receive from the corporation the same information that the holders of certificates receive when certificates are issued. There is no requirement that this information be delivered to purchasers of uncertificated shares before purchase.

Detailed rules with respect to the issuance, transfer, and registration of both certificated and uncertificated shares appear in article 8 of the UNIFORM COMMERCIAL CODE. In general terms there are no differences between certificated and uncertificated securities except in matters such as their manner of transfer. See the Official Comment to section 625.

IDAHO REPORTER'S COMMENT

Uncertificated shares are a very recent development. The "back office crisis" in brokerage firms in the late 1960s demonstrated that certificates for shares were a relatively inefficient

method of handling large volumes of securities that were widely traded on public securities exchanges and over-the-counter. In 1969, the ABA Committee on Corporate Laws concluded that, from a strictly legal viewpoint, the elimination of share certificates was possible, and that the use of certificates in the future might well be limited to situations in which they are specifically requested or, conceivably, that the use of certificates might be abolished entirely. Since then, the use of uncertificated shares has grown steadily. Most open end investment companies today do not issue certificates for shares unless expressly requested to do so. Utilization by brokerage firms and institutions of the Depository Trust Company, which effects transfers between depositors by bookkeeping entry, also effectively involves certificateless shares outside the traditional corporation statutes. It is probable that with increasing experience and familiarity with uncertificated shares, many corporations, including closely held corporations, will elect to utilize these shares.

In 1978, section 23 of the 1969 Model Act was amended to expressly authorize uncertificated shares. IDAHO did not include this amendment in the 1979 revision. IDAHO has since, however, in 1995 adopted the 1994 revision of UCC Article 8, designed to provide a modern legal structure for current securities holding practices. This updated Article 8 is designed to encompass both modern developments of the indirect holding system and the uncertificated system. This new section 626 is consistent with our updated UCC Article 8.

30-1-627. Restriction on transfer of shares and other securities. — (1) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(2) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by section 30-1-626(2), Idaho Code. Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction.

(3) A restriction on the transfer or registration of transfer of shares is authorized:

(a) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(b) To preserve exemptions under federal or state securities law;

(c) For any other reasonable purpose.

(4) A restriction on the transfer or registration of transfer of shares may:

(a) Obligate the shareholder first to offer the corporation or other persons, separately, consecutively, or simultaneously, an opportunity to acquire the restricted shares;

(b) Obligate the corporation or other persons, separately, consecutively, or simultaneously, to acquire the restricted shares;

(c) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable;

(d) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

(5) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

History.
I.C., § 30-1-627, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Share transfer restrictions are widely used by both publicly held and closely held corporations for a variety of appropriate purposes. Although most courts have upheld reasonable share transfer restrictions, a few have rigidly followed the common law rule that they constituted restraints on alienation and should be strictly construed. As a result, some cases have invalidated restrictions outright or construed them narrowly so as not to cover specific transfers. By prescribing reasonable rules to govern the use of transfer restrictions, section 627 should guide practitioners in their use and encourage a more uniform and favorable judicial reception.

Examples of the uses of share transfer restrictions include:

(1) a close corporation may impose share transfer restrictions to qualify for the close corporation election under the Model Statutory Close Corporation Supplement;

(2) a corporation with relatively few shareholders may impose share transfer restrictions to ensure that current shareholders will be able to control who may participate in the corporation's business;

(3) a corporation with relatively few shareholders may impose share transfer restrictions to ensure that shareholders who wish to retire will be able to liquidate their investment without disrupting corporate affairs;

(4) a corporation with few shareholders may impose share transfer restrictions in an effort to ensure that estates of deceased shareholders will be able to liquidate the closely held shares and that the Internal Revenue Service will accept the liquidated value of the shares as their value for estate tax purposes;

(5) a professional corporation may impose share transfer restrictions to ensure that its treatment of retiring or deceased shareholders is consistent with the canons of ethics applicable to the profession in question;

(6) a corporation may impose share transfer restrictions to ensure that its election of subchapter S treatment under the Internal Revenue Code will not be unexpectedly terminated; and

(7) a publicly held or closely held corporation issuing securities pursuant to an exemption from federal or state securities act registration may impose share transfer restrictions to ensure that subsequent transfers of shares will not result in the loss of the exemption being relied upon.

This listing, while not exhaustive, illustrates the flexibility of share transfer restrictions, their widespread use, and the importance of having a statute dealing with them.

Section 627(1) generally authorizes the imposition of transfer restrictions on "shares," although the caption of the section refers to "shares and other securities." Section 627(5) defines "shares" for purposes of section 627 to include securities "convertible into or carrying a right to subscribe for or acquire shares;" the phrase "other securities" in the title thus describes the broader scope of this section resulting from the definition in section 627(5).

Share transfer restrictions are usually created by provisions in the bylaws or articles of incorporation but may also be created by contract between the corporation and some or all the shareholders or between or among the shareholders themselves. However, if shares are originally issued free of restriction, they may not thereafter be subjected to a transfer restriction without the consent of the holder, evidenced by a vote in favor of the amendment to the articles or bylaws creating the restriction, or by being a party to the contract creating the restriction.

The terms of a restriction on transfer do not need to be set forth in full or summarized in detail on a certificate or information statement required by section 626(2) for uncertificated securities. Rather, section 627(2) provides that in the case of a certificated security, the existence of the restriction must be conspicuously set forth on the front or back of the certificate; in the case of an uncertificated security, the existence of the restriction must be noted in the information statement. There is no requirement that the notation on an information statement be conspicuous.

If a transferee knows of the restriction he is bound by it even though the restriction is not noted on the certificate or information statement.

Section 627(3) describes the purposes for which restrictions may be imposed while section 627(4) describes the types of restrictions that may be imposed.

Section 627(3) enumerates certain purposes for which share transfer restrictions may be imposed, but does not limit the purposes since section 627(3)(c) permits restrictions "for any other reasonable purpose." Examples of the "status" referred to in section 627(3)(a) are the election of close corporation status under the Model Statutory Close Corporation Supplement, the subchapter S election under the Internal Revenue Code, and entitlement to a program or eligibility for a privilege administered by governmental agencies or national securities exchanges. Specific references in section 627 to subchapter S and other statutes were not made because of the possibility that the Internal Revenue Code or other statute may be amended or recodified after the adoption of the Model Act.

Section 627(3)(b) permits restrictions on transfers of shares to ensure availability of exemptions under state or federal securities acts. Share transfer restrictions for other purposes are permitted by section 623(3)(c) so long as the purpose is reasonable. It is unnecessary to inquire into the reasonableness of the purposes specifically enumerated in sections 627(3)(a) and (b).

The types of restrictions referred to in section 627(4)(a) (buy-sell agreements) and (b) (option agreements) are imposed as a matter of contractual negotiation and do not prohibit the outright transfer of shares. Rather, they designate to whom shares or other securities must be offered at a price established in the agreement or by a formula or method agreed to in advance. By contrast, the restrictions described in sections 627(4)(c) and (d) may permanently limit the market for shares by disqualifying all or some potential purchasers. As a result the restrictions imposed by these two provisions must not be "manifestly unreasonable."

IDAHO REPORTER'S COMMENT

Section 627 is an entirely new Model Act provision which, like prior I.C. § 30-1-23A, is patterned generally after the Delaware statute on share transfer restrictions, which are widely used by both large and small corporations for a variety of legitimate purposes. New section 627 is updated from the Delaware and Idaho versions to provide for such matters as uncertificated shares and seems at least a little more efficiently organized and worded.

30-1-628. Expense of issue. — A corporation may pay the expenses of selling or underwriting its shares, and of organizing or reorganizing the corporation, from the consideration received for shares.

History.
I.C., § 30-1-628, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The original purpose of this section was to deal with the problems created by the concepts of "par value" and "stated capital;" it permitted the corporation to expend its capital for "the reasonable charges and expenses of" organization without fear of making the shares not fully paid or assessable because the assets were reduced below the aggregate par value of the issued shares.

Under the modern capitalization principles set forth in the Model Act (see the Official Comment to section 621), there is no basis for the fear that shares issued properly under section 621 can be made assessable because of the subsequent use of the proceeds. While section 628 thus may be technically unnecessary, it was believed to be desirable to retain in the Model Act a general authorization to the corporation to pay its expenses of formation and raising capital out of its original capitalization. The reference to "reasonable" charges and expenses was deleted on the theory that the test for these expenses should be no different from the test for expenses of any other type.

The concluding language in the original Model Act, "without rendering the shares not fully paid or assessable," was also deleted as unnecessary and confusing in the context of the revisions to the financial provisions of the Model Act.

This section has been rarely cited or referred to in court decisions even though it appears in a large number of state statutes.

IDAHO REPORTER'S COMMENT

New section 628 covers the same ground as prior I.C. § 30-1-22 more directly and in fewer words.

30-1-629. [Reserved.]

30-1-630. Shareholders' preemptive rights. — (1) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide.

(2) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights," or words of similar import, means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(a) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unisssued [unissued] shares upon the decision of the board of directors to issue them.

(b) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(c) There is no preemptive right with respect to:

(i) Shares issued as compensation to directors, officers, agents or employees of the corporation, its subsidiaries or affiliates;

(ii) Shares issued to satisfy conversion rights or option rights created to provide compensation to directors, officers, agents or employees of the corporation, its subsidiaries or affiliates;

(iii) Shares authorized in articles of incorporation that are issued within six (6) months from the effective date of incorporation;

(iv) Shares sold otherwise than for money.

(d) Holders of shares of any class without general voting rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

(e) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(f) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one (1) year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one (1) year is subject to the shareholders' preemptive rights.

(3) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

History.

I.C., § 30-1-630, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in paragraph (2)(a) was added by the compiler to correct a misspelling in the enacting legislation.

ABA OFFICIAL COMMENT

Section 630(1) adopts an "opt in" provision for preemptive rights: Unless an affirmative reference to these rights appears in the articles of incorporation, no preemptive rights exist. Whether or not preemptive rights are elected, however, the directors' fiduciary duties extend to the issuance of shares. Issuance of shares at favorable prices to directors (but excluding other shareholders) or the issuance of shares on a nonproportional basis for the purpose of affecting control rather than raising capital may violate that duty. These duties, it is believed, form a more rational structure of regulation than the technical principles of traditional preemptive rights.

Section 630(2) provides a standard model for preemptive rights if the corporation desires to exercise the "opt in" alternative of section 630(1). The simple phrase, "the corporation elects to have preemptive rights," or words of similar import, results in the rest of subsection (2) becoming applicable to the corporation. But a corporation may qualify or limit any of the rules set forth in subsection (2) by express provisions in the articles of incorporation if the rules are felt to be undesirable or inappropriate for the specific corporation. The purposes of this standard model for preemptive rights are (1) to simplify drafting articles of incorporation and (2) to provide a simple checklist of business considerations for the benefit of attorneys who are considering the inclusion of preemptive rights in articles of incorporation.

The provisions of section 630(2) establish rules for most of the problems involving preemptive rights. Thus subsection (2)(a) defines the general scope of the preemptive right giving appropriate recognition to the discretion of the board of directors in establishing the terms and conditions for exercise of that right. Subsection (2)(b) creates rules with respect to the waiver of these rights. Subsection (2)(c) lists the principal exceptions to preemptive rights, including a six-month period during which initial capital can be raised by a newly formed corporation without regard to the preemptive rights of persons who have previously acquired shares. Subsections (2)(d) and (2)(e) provide rules for the often-difficult problems created when preemptive rights are recognized in corporations with more than a single class of shares. These problems are discussed further below. Subsection (2)(f) defines the status of preemptive rights after a shareholder has elected not to exercise a proffered preemptive right: for a period of one year thereafter the corporation may dispose of the shares at the same or a higher price. A corporation deciding to offer shares at a lower price must reoffer the shares preemptively to the shareholders before selling them to third persons.

As indicated above, any portion of section 630(2) that is felt not to be appropriate for a specific corporation may be amended or deleted by appropriate provision in the articles of incorporation.

The model provision dealing with preemptive rights in section 630(2) is primarily designed to protect voting power within the corporation from dilution. For this reason, section 630(3) contains a special definition of "shares" to ensure that the preemptive rights of shareholders, if these rights are granted, apply to all securities that are convertible into or carry a right to acquire voting shares.

On the other hand, preemptive rights also may serve in part the function of protecting the equity participation of shareholders. This combination of functions creates no problem in a corporation that has authorized only a single class of shares but may occasionally create problems in corporations with more complex capital structures. In many multiple-class corporate financial structures, the issuance of additional shares of one class does not adversely affect other classes. For example, the issuance of additional general voting shares without preferential rights normally does not affect either the limited voting power or equity participation of holders of shares with preferential rights; holders of shares with preferential equity participation rights but without general voting rights should therefore have no preemptive rights with respect to general voting shares without preferential rights. See subsections (2)(d) and (2)(e). Classes of shares that may give rise to possible conflict between the protection of voting interests and equity participation when the board of directors desires to issue additional shares include classes of nonvoting shares without preferential rights and

classes of shares with both preferential rights to distributions and general voting rights. Attorneys who draft articles of incorporation with classes of shares that may give rise to these conflicts should consider the precise application of section 630(2) with respect to preemptive rights for these classes and define more carefully the scope of the preemptive rights desired.

IDAHO REPORTER'S COMMENT

[Note: Much of the following discussion is taken verbatim, or close to verbatim, from the "Historical Background" annotation in the MODEL BUSINESS CORPORATION ACT ANNOTATED, Third Edition.]

1. General Historical Background. The doctrine of preemptive rights was created by the judiciary to ensure evenhanded treatment of all shareholders by the corporation when issuing shares. Preemptive rights addressed the problems created when new voting shares were issued to one group of shareholders without an equal opportunity of participation by opposing groups or when shares were offered at less than their fair value. In either case, injury to the unfavored group was avoided by recognition of a preemptive right of each shareholder to subscribe for a proportional number of additional shares.

The first case to recognize preemptive rights was *Gray v. Portland Bank*, 3 Mass. 364 (1807). The case that most clearly articulates the underlying philosophical base of preemptive rights, however, is *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906), which viewed preemptive rights as a vested property interest that was an essential incident to the ownership of shares.

It gradually became apparent, however, that the doctrine of preemptive rights created serious problems in some situations. In the first place, the common law of preemptive rights was developed at a time when most capital structures were uncomplicated. When a corporation has several classes of shares outstanding, it is often impossible to find any method for allocating additional shares that will preserve fully the shareholders' relative rights both as to voting power and financial interest. It became necessary, therefore, to define in the articles the preemptive rights with a view to the circumstances of the particular capital structure, and even these individually-tailored provisions often did not fully preserve the rights of various classes of shares. Second, preemptive rights greatly complicate access to the national markets for equity capital by publicly held corporations. Preemptive rights require a prior offering to existing shareholders before going to the national market for equity capital, a practical impossibility in many situations which has led to the almost universal elimination of preemptive rights by companies before their initial public offerings.

These problems with preemptive rights led many states, beginning about 1930, to the adoption of statutes relating to preemptive rights. Many of these statutes authorized the corporation to limit or deny entirely preemptive rights by appropriate provision in the articles of incorporation, on the theory that general fiduciary duties of directors provided effective protection against abuses of the power to issue additional shares. These statutes reflect that, language in some earlier cases to the contrary notwithstanding, a preemptive right is not a vested right and may be limited or eliminated entirely if statutory authority to do so exists.

2. History of the Model Act and the Idaho Act. The 1950 Model Act followed the basic approach of the post-1930 state statutes by making preemptive rights optional but adopted an "opt out" approach by providing that the preemptive rights of shareholders "to acquire additional or treasury shares" may be limited or denied by provision in the articles. In 1953, the word "unissued" was substituted for "additional" to clearly include originally authorized as well as subsequently authorized shares.

In 1955 the Model Act was amended by adding an "[alternative] section," that provided an "opt in" rather than an "opt out" approach: under the alternative section, no preemptive rights existed unless a specific affirmative provision granting these rights was included in the articles. This alternative provision was based on revisions of the preemptive rights statutes adopted by several states during this period. In the 1969 Model Act, the "[alternative] section," containing the "opt in" provision was numbered section 26 while the previous section was retitled "section 26A. Shareholders Preemptive Rights [Alternative]." Thus, the alternative approach of the 1950 Model Act was retained but the preference was reversed with the "opt in" provision becoming the standard section. This change in preference reflected increased skepticism as to the value of preemptive rights coupled with increased recognition of the problems they created for many corporations. On the other hand, the ABA Committee was unwilling to ignore the long history of preemptive rights and eliminate the "opt out" provision entirely from the statute. The decision in the 1984 Model Act to adopt an "opt in" approach is thus consistent with the long term trend in the development of this Model Act provision.

This long term trend notwithstanding, in connection with IDAHO's 1979 REVISION the prior Model Act section 26A "opt out" provision [prior I.C. § 30-1-26] was chosen. At the time of the 1979 revision it was felt that, given the nature of almost all Idaho corporations, an "opt out" approach better "balances the conflicting concerns of publicly and closely held corporations than does" the new standard Model Act "opt in" approach. It has now been determined instead, however, that the "opt out" provisions of prior I.C. § 30-1-26 constitute a trap for the unwary and that the "opt in" provisions of this new section 630 are preferable in that they require that a conscious decision be made to accord preemptive rights to a corporation's shareholders.

An "opt out" provision requires the statute itself to define the scope of preemptive rights, while an "opt in" provision may be general in terms, with the articles defining the precise scope of preemptive rights. This paragraph describes the changes relating to the scope of preemptive rights made in the old "opt out" provisions of the Model Act and the prior Idaho Act. The 1950 Act contained only a single exception to the preemptive right: shares could be issued to officers or employees pursuant to a plan approved by two-thirds of the outstanding shares without recognition of preemptive rights of the remaining shareholders; this exception now appears in modified form in section 630(2)(c)(i) and (ii). In 1962 the approval requirement was reduced from two-thirds to a simple majority. The 1969 Model Act recognized several additional exceptions in its "opt out" provision [prior I.C. § 30-1-26]. The exception with respect to shares issued to officers or employees was broadened to include directors. In addition, exceptions to preemptive rights were recognized for (1) shares sold otherwise than for money, (2) holders of shares of a class preferred or limited as to dividends or assets, (3) holders of common shares to acquire shares preferred or limited as to obligations or dividend entitlement (unless the shares were convertible into common shares or carried a right to subscribe for common shares), and (4) holders of non-voting common shares to acquire common shares with voting rights. In addition to these Model Act exceptions, Idaho's 1979 revision retained the prior exception for "any shares issued to satisfy conversion or option rights granted by the corporation on previously authorized sales." These exclusions constitute statutory recognition of situations where, in the ordinary case, preservation of preemptive rights was believed to be unnecessary to protect the interests of shareholders from dilution. Each of these exclusions were subject to restrictions or modification by appropriate provisions in the articles of incorporation.

Section 630 of the 1984 Model Act unequivocally accepts the "opt in" approach to preemptive rights. It is coupled, however, with the approach of providing a standard clause that simplifies the definition of preemptive rights for the corporation that does decide to "opt in." Thus, section 630 combines the value judgment preferring an "opt in" approach with the advantages of defining the scope of preemptive rights in the statute for the benefit of corporations and their attorneys who desire preemptive rights but may not be aware of limitations that experience has indicated may be desirable to the recognition of preemptive rights. The manner of election of this standard clause under section 630(2) requires only a simple statement of the election in the articles. This election may be subject to further qualification or limitation in the articles of incorporation.

Section 630(2)(a) follows the language of section 26A of the 1969 Model Act [prior I.C. § 30-1-26] in defining preemptive rights, but with stylistic and language changes. Section 630(2)(b) is a new provision that codifies common law principles relating to the waiver of these rights.

Section 630(2)(c) provides a more complete list of exceptions to the recognition of preemptive rights than was provided by section 26A of the 1969 Act [prior I.C. § 30-1-26]. Section 630(2)(c)(i) and (ii) continued the exception for shares or options issued as incentives to officers, employees or directors; however, the requirement in section 26A [prior I.C. § 30-1-26] that the plan be previously approved by a vote of the majority of the shares has been deleted to conform with new section 624's transfer of general control of employee compensation plans from shareholders to directors. Section 630(2)(c)(iii) codifies the "original issue" exception to preemptive rights recognized in the case law. Section 630(2)(d) and (e) are statements of exceptions that appear in somewhat different form in section 26A of the 1969 Act [prior I.C. § 30-1-26]; they were revised to eliminate references to "common" or "preferred" shares but were not changed substantively.

Section 630(2)(f) provides statutory answers to practical problems that often arise when preemptive rights exist: may the corporation resell shares for which the shareholder has elected not to exercise his preemptive rights, and if so, may it do so at a lower price than originally offered to the shareholder?

Section 630(3) is new and defines the scope of preemptive rights when convertible shares or shares carrying with them the right to acquire common shares are involved.

Statutes of many states [including prior I.C. § 30-1-26] address the question of preemptive rights in connection with treasury shares. No such provision is necessary in the Model Act in light of the almost complete elimination of the concept of treasury shares. Any treasury shares

would be treated as unissued shares for purposes of this new section 630. See the COMMENTS to section 631 next below.

Finally, by virtue of the saving clause in new section 1703, corporations formed prior to July 1, 1997, whose articles of incorporation are silent on preemptive rights will be governed by the law in effect when such articles were filed. For example, if a corporation were formed in 1990 and its articles did not limit or deny preemptive rights, its shareholders would continue to have preemptive rights (which accrued prior to repeal of the previous law) in accordance with the law in effect prior to July 1, 1997.

30-1-631. Corporation's acquisition of its own shares. — (1) A corporation may acquire its own shares. Unless a resolution of the board of directors or the corporation's articles of incorporation provide otherwise, shares so acquired constitute authorized but unissued shares.

(2) If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation pursuant to section 30-1-1005(6), Idaho Code.

(3) A corporation has authority to use, hold, acquire, cancel and dispose of treasury shares.

(4) Unless the board of directors adopts an amendment to the corporation's articles of incorporation to reduce the number of authorized shares, treasury shares of the corporation that are cancelled shall be treated as authorized but unissued shares.

History.

I.C., § 30-1-631, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 8, p. 907.

ABA OFFICIAL COMMENT

Section 631 applies only to shares that a corporation acquires for its own account. Shares that a corporation acquires in a fiduciary capacity for the account of others are not considered to be acquired by the corporation for purposes of this section.

Shares that are reacquired by the corporation become authorized but unissued shares under section 631(1) unless the articles prohibit reissue, in which event the shares are canceled and the number of authorized shares is reduced as required by section 631(2).

If the number of authorized shares of a class is reduced as a result of the operation of section 631(2), the board should amend the articles of incorporation under section 1005(6) to reflect that reduction. If there are no remaining authorized shares in a class as a result of the operation of section 631, the board should amend the articles of incorporation under section 1005(7) to delete the class from the classes of shares authorized by articles of incorporation.

[Note: The Model Act, unlike I.C. §30-1-631, has eliminated the concept of "treasury shares." See IDAHO REPORTER'S COMMENT, below.]

IDAHO REPORTER'S COMMENT

Here we see one of the several areas very significantly simplified by the elimination of par value-related concepts. Along with the elimination of the par value and legal capital concepts in the 1997 adoption of the Model Act, the need to recognize the peculiar concept of treasury shares was also eliminated. The 1997 Idaho revisers, however, continued to believe that there are some circumstances in which a corporation may wish to retain treasury shares (e.g., for purposes of funding a restricted stock plan for directors or other incentive plan tied to future services, which otherwise would be prohibited by ID Const., Art. XI, §9). Subsection (3) was therefore added to the Official Text in Idaho in 1997.

Subsection (4) was also added in 1997 to provide guidance for those corporations who may continue to hold and then wish to dispose of treasury shares.

Under the Model Act, by comparison, reacquired shares automatically "revert" to the status of "authorized but unissued shares," or are cancelled and the authorized shares reduced if the

articles do not permit reissuance. Such reduction requires amendment of the articles, provision for which will now be under I.C. § 30-1-1005 (6) rather than under 30-1-631.

30-1-632 — 30-1-639. [Reserved.]

30-1-640. Distributions to shareholders. — (1) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (3) of this section.

(2) If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption or other acquisition of the corporation's shares, it is the date the board of directors authorizes the distribution.

(3) No distribution may be made if, after giving it effect:

(a) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(b) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(4) The board of directors may base a determination that a distribution is not prohibited under subsection (3) of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(5) Except as provided in subsection (7) of this section, the effect of a distribution under subsection (3) of this section is measured:

(a) In the case of distribution by purchase, redemption or other acquisition of the corporation's shares, as of the earlier of:

(i) The date money or other property is transferred or debt incurred by the corporation, or

(ii) The date the shareholder ceases to be a shareholder with respect to the acquired shares;

(b) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(c) In all other cases, as of:

(i) The date the distribution is authorized if the payment occurs within one hundred twenty (120) days after the date of authorization, or

(ii) The date the payment is made if it occurs more than one hundred twenty (120) days after the date of authorization.

(6) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

(7) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations

under subsection (3) of this section if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made.

(8) This section shall not apply to distributions in liquidation under part 14 of this chapter.

History.

I.C., § 30-1-640, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 9, p. 907.

ABA OFFICIAL COMMENT

The reformulation of the statutory standards governing distributions is another important change made by the 1980 revisions to the financial provisions of the Model Act. It has long been recognized that the traditional "par value" and "stated capital" statutes do not provide significant protection against distributions of capital to shareholders. While most of these statutes contained elaborate provisions establishing "stated capital," "capital surplus," and "earned surplus" (and often other types of surplus as well), the net effect of most statutes was to permit the distribution to shareholders of most or all of the corporation's net assets — its capital along with its earnings — if the shareholders wished this to be done. However, statutes also generally imposed an equity insolvency test on distributions that prohibited distributions of assets if the corporation was insolvent or if the distribution had the effect of making the corporation insolvent or unable to meet its obligations as they were projected to arise.

The financial provisions of the revised Model Act, which are based on the 1980 amendments, sweep away all the distinctions among the various types of surplus but retain restrictions on distributions built around both the traditional equity insolvency and balance sheet tests of earlier statutes.

1. THE SCOPE OF SECTION 640. Section 140 defines "distribution" to include virtually all transfers of money, indebtedness of the corporation or other property to a shareholder in respect of the corporation's shares. It thus includes cash or property dividends, payments by a corporation to purchase its own shares, distributions of promissory notes or indebtedness, and distributions in partial or complete liquidation or voluntary or involuntary dissolution. Section 140 excludes from the definition of "distribution" transactions by the corporation in which only its own shares are distributed to its shareholders. These transactions are called "share dividends" in the revised Model Act. See section 623.

Section 640 imposes a single, uniform test on all distributions. Many of the old "par value" and "stated capital" statutes provided tests that varied with the type of distribution under consideration or did not cover certain types of distributions at all.

2. EQUITY INSOLVENCY TEST. As noted above, older statutes prohibited payments of dividends if the corporation was, or as a result of the payment would be, insolvent in the equity sense. This test is retained, appearing in section 640(3)(a).

In most cases involving a corporation operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the equity insolvency test is needed. While neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant shareholders' equity and normal operating conditions are of themselves a strong indication that no issue should arise under that test. Indeed, in the case of a corporation having regularly audited financial statements, the absence of any qualification in the most recent auditor's opinion as to the corporation's status as a "going concern," coupled with a lack of subsequent adverse events, would normally be decisive.

It is only when circumstances indicate that the corporation is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the board of directors or, more commonly, the officers or others upon whom they may place reliance under section 830(2), may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no one or more "bright line" tests can be employed. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the corporation's business are customarily justified, absent clear

evidence to the contrary. These include the likelihood that (a) based on existing and contemplated demand for the corporation's products or services, it will be able to generate funds over a period of time sufficient to satisfy its existing and reasonably anticipated obligations as they mature, and (b) indebtedness which matures in the near-term will be refinanced where, on the basis of the corporation's financial condition and future prospects and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. To the extent that the corporation may be subject to asserted or unasserted contingent liabilities, reasonable judgments as to the likelihood, amount, and time of any recovery against the corporation, after giving consideration to the extent to which the corporation is insured or otherwise protected against loss, may be utilized. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over the period of time that they will mature.

In exercising their judgment, the directors are entitled to rely, under section 830(2) as noted above, on information, opinions, reports, and statements prepared by others. Ordinarily, they should not be expected to become involved in the details of the various analyses or market or economic projections that may be relevant. Judgments must of necessity be made on the basis of information in the hands of the directors when a distribution is authorized. They should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the corporation's business to repay long-term obligations which do not mature for several years, since the primary focus of the directors' decision to make a distribution should normally be on the corporation's prospects and obligations in the shorter term, unless special factors concerning the corporation's prospects require the taking of a longer term perspective.

3. RELATIONSHIP TO THE FEDERAL BANKRUPTCY ACT AND OTHER FRAUDULENT CONVEYANCE STATUTES. The revised Model Act establishes the validity of distributions from the corporate law standpoint under section 640 and determines the potential liability of directors for improper distributions under sections 830 and 833. The federal Bankruptcy Act and state fraudulent conveyance statutes, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds distributed to others in some circumstances. In light of these diverse purposes, it was not thought necessary to make the tests of section 640 identical to the tests for insolvency under these various statutes.

4. BALANCE SHEET TEST. Section 640(3)(b) requires that, after giving effect to any distribution, the corporation's assets equal or exceed its liabilities plus (with some exceptions) the dissolution preferences of senior equity securities. Section 640(4) authorizes asset and liability determinations to be made for this purpose on the basis of either (1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or (2) a fair valuation or other method that is reasonable in the circumstances. The determination of a corporation's assets and liabilities and the choice of the permissible basis on which to do so are left to the judgment of its board of directors. In making a judgment under section 640(4), the board may rely under section 830(2) upon opinions, reports, or statements, including financial statements and other financial data prepared or presented by public accountants or others.

Section 640 does not utilize particular accounting terminology of a technical nature or specify particular accounting concepts. In making determinations under this section, the board of directors may make judgments about accounting matters, giving full effect to its right to rely upon professional or expert opinion.

In a corporation with subsidiaries, the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting (see American Institute of Certified Public Accountants, APB Opinion No. 18 (1971)) as to the corporation's investee corporations, including corporate joint ventures and subsidiaries, although other evidence would be relevant in the total determination.

a. Generally accepted accounting principles. The board of directors should in all circumstances be entitled to rely upon reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of section 640(3)(b) has been met, unless the board is then aware that it would be unreasonable to rely on the financial statements because of newly-discovered or subsequently arising facts or circumstances. But section 640 does not mandate the use of generally accepted accounting principles; it only requires the use of accounting practices and principles that are reasonable in the circumstances. While publicly-owned corporations subject to registration under the Securities Exchange Act of 1934 must, and many other corporations in fact do, utilize financial statements prepared on the basis of generally accepted accounting principles, a great

number of smaller or closely-held corporations do not. Some of these corporations maintain records solely on a tax accounting basis and their financial statements are of necessity prepared on that basis. Others prepare financial statements that substantially reflect generally accepted accounting principles but may depart from them in some respects (e.g., footnote disclosure). These facts of corporate life indicate that a statutory standard of reasonableness, rather than stipulating generally accepted accounting principles as the normative standard, is appropriate in order to achieve a reasonable degree of flexibility and to accommodate the needs of the many different types of business corporations which might be subject to these provisions, including in particular closely-held corporations. Accordingly, the revised Model Act contemplates that generally accepted accounting principles are always "reasonable in the circumstances" and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness, even if they do not involve the "fair value" or "current value" concepts that are also contemplated by section 640(4).

b. Other principles. Section 640(4) specifically permits determinations to be made under section 640(3)(b) on the basis of a fair valuation or other method that is reasonable in the circumstances. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a "quick-sale liquidation" method to value an enterprise, particularly with respect to the payment of normal dividends. On the other hand, a "quick-sale liquidation" valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a corporation should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (e.g., a valuable executory contract). Likewise, all of a corporation's material obligations should be considered and revalued to the extent appropriate and possible. In any event, section 640(4) calls for the application under section 640(3)(b) of a method of determining the aggregate amount of assets and liabilities that is reasonable in the circumstances. Section 640(4) also refers to some "other method that is reasonable in the circumstances." This phrase is intended to comprehend within section 640(3)(b) the wide variety of possibilities that might not be considered to fall under a "fair valuation" or "current value" method but might be reasonable in the circumstances of a particular case.

5. PREFERENTIAL DISSOLUTION RIGHTS AND THE BALANCE SHEET TEST. Section 640(3)(b) provides that a distribution may not be made unless the total assets of the corporation exceed its liabilities plus the amount that would be needed to satisfy any shareholder's superior preferential rights upon dissolution if the corporation were to be dissolved at the time of the distribution. This requirement in effect treats preferential dissolution rights of shares for distribution purposes as if they were liabilities for the sole purpose of determining the amount available for distributions, and carries forward analogous treatment of shares having preferential dissolution rights from earlier versions of the Model Act. In making the calculation of the amount that must be added to the liabilities of the corporation to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be established pursuant to the articles of incorporation, as of the date of the distribution or proposed distribution. The amount so determined must include arrearages in preferential dividends if the articles of incorporation require that they be paid upon the dissolution of the corporation. In the case of shares having both a preferential right upon dissolution and other nonpreferential rights, only the preferential right should be taken into account. The treatment of preferential dissolution rights of classes of shares set forth in section 640(3)(b) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of section 640(3)(a). The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the articles of incorporation.

6. TIME OF MEASUREMENT. Section 640(5)(c) provides that the time for measuring the effect of a distribution for compliance with the equity insolvency and balance sheet tests for all distributions not involving the reacquisition of shares or the distribution of indebtedness is the date of authorization, if the payment occurs within 120 days following the authorization; if the payment occurs more than 120 days after the authorization, however, the date of payment must be used. If the corporation elects to make a distribution in the form of its own indebtedness, under section 640(5)(b) the validity of that distribution must be measured as of the time of distribution, unless the indebtedness qualifies under section 640(7).

Section 640(5)(a) provides a different rule for the time of measurement when the distribution involves a reacquisition of shares. See below, Application to Reacquisition of Shares — Time of measurement.

7. RECORD DATE. Section 640(2) fixes the record date (if the board of directors does not otherwise fix it) for distributions other than those involving a reacquisition of shares as the date the board of directors authorizes the distribution. No record date is necessary for a reacquisition of shares from one or more specific shareholders. The board of directors has discretion to set a record date for a reacquisition if it is to be pro rata and to be offered to all shareholders as of a specified date.

8. APPLICATION TO REACQUISITION OF SHARES. The application of the equity insolvency and balance sheet tests to distributions that involve the purchase, redemption, or other acquisition of the corporation's shares creates unique problems; section 640 provides a specific rule for the resolution of these problems as described below.

9. DISTRIBUTIONS IN LIQUIDATION. Subsection (8) provides that distributions in liquidation under part 14 are not subject to the distribution limitations of section 640. Part 14 provides specifically for payment of creditor claims and distributions to shareholders in liquidation upon dissolution of the corporation. See section 1409.

a. Time of measurement. Section 640(5)(a) provides that the time for measuring the effect of a distribution under section 640(3), if shares of the corporation are reacquired, is the earlier of (i) the payment date, or (ii) the date the shareholder ceased to be a shareholder with respect to the shares, except as provided in section 640(7).

b. When tests are applied to redemption-related debt. In an acquisition of its shares, a corporation may transfer property or incur debt to the former holder of the shares. The case law on the status of this debt is conflicting. However, share repurchase agreements involving payment for shares over a period of time are of special importance in closely-held corporate enterprises. Section 640(5) provides a clear rule for this situation: the legality of the distribution must be measured at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid, except as provided in section 640(7). Of course, this does not preclude a later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to a creditor.

c. Priority of debt distributed directly or incurred in connection with a reacquisition of shares. Section 640(6) provides that indebtedness created to acquire the corporation's shares or issued as a distribution is on a parity with the indebtedness of the corporation to its general, unsecured creditors, except to the extent subordinated by agreement. General creditors are better off in these situations than they would have been if cash or other property had been paid out for the shares or distributed (which is proper under the statute), and no worse off than if cash had been paid or distributed and then lent back to the corporation, making the shareholders (or former shareholders) creditors. The parity created by section 640(6) is logically consistent with the rule established by section 640(5) that these transactions should be judged at the time of the issuance of the debt.

d. Treatment of certain indebtedness. Section 640(7) provides that indebtedness need not be taken into account as a liability in determining whether the tests of section 640(3) have been met if the terms of the indebtedness provide that payments of principal or interest can be made only if and to the extent that payment of a distribution could then be made under section 640. This has the effect of making the holder of the indebtedness junior to all other creditors but senior to the holders of all classes of shares, not only during the time the corporation is operating but also upon dissolution and liquidation. It should be noted that the creation of such indebtedness, and the related limitations on payments of principal and interest, may create tax problems or raise other legal questions.

Although section 640(7) is applicable to all indebtedness meeting its test, regardless of the circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the reacquisition of shares of the corporation at a time when the deferred purchase price exceeds the net worth of the corporation. This type of reacquisition will often be necessary in the case of businesses whose value derives principally from existing or prospective net income or cash flow rather than from net asset value. In such situations, it is anticipated that net worth will grow over time from operations so that when payments in respect of the indebtedness are to be made the two insolvency tests will be satisfied. In the meantime, the fact that the indebtedness is outstanding will not prevent distributions that could be made under subsection (3) if the indebtedness were not counted in making the determination.

IDAHO REPORTER'S COMMENT

The financial amendments in the new Model Act are based on the premise that the elaborate structure of rules in earlier versions such as our prior IDAHO Act did not actually provide any realistic protection to creditors or senior securities holders.

These prior rules are also extremely technical and complex and subject to manipulation, so that the intended protections often prove to be more apparent than real. These new Model Act provisions recognize that the most significant practical protection is the prohibition against distributions when the corporation is insolvent or would be rendered insolvent. In addition, the new Model Act retains a simplified balance sheet test.

This new section of 640 of the Model Act expands upon existing standards to determine the legality of distributions to shareholders. Subsection (3) prohibits any distribution if, after giving it effect, the corporation would not be able to pay its debts as they become due in the usual course of business (the "equity solvency" test) or the corporation's total assets would be less than the sum of its total liabilities plus the amount of any liquidation preferences of shareholders whose preferential rights are superior to the rights of the distributees (the "balance sheet" test). These two tests were already embodied in prior law (see prior Idaho Code §§ 30-1-46(a) and (b), respectively). However, subsection (4) expands upon the balance sheet test in subsection (3)(b) by authorizing the board of directors to base a determination as to the legality of a distribution on accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances. Under this provision, a board could (for example) legally approve a distribution based upon a write-up of assets to fair market value or, in the case of a service business, a discounted cash flow valuation, even if liabilities might exceed assets under generally accepted accounting principles.

Subsection (8) was added in 2004 and reflects that new section 1409 provides specifically for payment of creditor claims and distributions to shareholders in liquidation upon dissolution. Such payments and distributions are no longer within section 640, the general section on distributions to shareholders.

Part 7. Shareholders

30-1-701. Annual meeting. — (1) A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws.

(2) Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

(3) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

History.

I.C., § 30-1-701, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

ABA OFFICIAL COMMENT

Section 701(1) requires every corporation to hold an annual meeting each year of shareholders entitled to participate in the election of directors and to consider other matters coming before the meeting of shareholders. The principal action to be taken at the annual meeting is the election of directors pursuant to section 803, but the purposes of an annual meeting are not limited and all matters appropriate for shareholder action may also be considered at that

meeting. An annual meeting is also the appropriate forum for a shareholder to raise any relevant question about the corporation's operations.

The requirement of section 701(1) that an annual meeting be held is phrased in mandatory terms to ensure that every shareholder entitled to participate in the meeting has the unqualified rights (1) to demand that the annual meeting be held and (2) to compel the holding of the meeting under section 703 if the corporation does not promptly hold the meeting. Many corporations, such as non-public subsidiaries and closely held corporations do not regularly hold annual meetings, and if no shareholder objects, that practice creates no problem under section 701, since section 701(3) provides that failure to hold an annual meeting does not affect the validity of any corporate action. Rather than holding an annual meeting, the shareholders may elect directors and take other appropriate action by unanimous written consent under section 704. And, even if the shareholders fail to elect directors, the directors currently in office continue in office under section 805 beyond the expiration of their terms.

The time and place of the annual meeting may be "stated in or fixed in accordance with the bylaws." If the bylaws do not themselves fix a time and place for the annual meeting, authority to fix them may be delegated to the board of directors or to a specified corporate officer. This section thus gives corporations the flexibility to hold annual meetings in varying places at varying times as convenience may dictate.

The annual meeting may be held either inside or outside the state or in a foreign country, but if the bylaws do not fix, or state the method of fixing, the place of the meeting, the meeting must be held at the "principal office" of the corporation. The principal office is defined in section 140 as the location of the principal executive office of the corporation and may or may not be its registered or official office under section 501. Section 1621 requires that the address of the principal office be specified in the corporation's annual report.

If the annual meeting is not held either within 6 months of the close of the corporation's fiscal year or within 15 months of the last annual meeting, a shareholder may compel an annual meeting to be held under section 703. In the absence of a demand for a meeting, a corporation can operate indefinitely without actually holding an annual meeting. The shareholders may act by unanimous consent under section 704, and in any event directors, once duly elected, remain in office until their successors are qualified. See section 805.

Authority granted to the board of directors or some individual to fix the time and place of the annual meeting must be exercised in good faith. See *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971).

IDAHO REPORTER'S COMMENT

New Model Act § 701 makes no substantive change from prior Idaho § 30-1-28's treatment of the annual shareholders' meeting requirement. The "default" meeting place, where none is provided in the bylaws, becomes the "principal" rather than the "registered" office, as was provided for by old section 28. Section 701(3) addresses an issue not previously addressed in our Idaho statutes.

30-1-702. Special meeting. — (1) A corporation shall hold a special meeting of shareholders:

(a) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(b) If the holders of at least twenty percent (20%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date and deliver to the corporation one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held, provided that the articles of incorporation may fix a lower percentage or a higher percentage not exceeding thirty-three and one-third percent (33 1/3%) of all the votes entitled to be cast on any issue proposed to be considered. Unless otherwise provided in the articles of incorporation, a written demand for a special meeting may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of demands sufficient in number to require the holding of a special meeting.

(2) If not otherwise fixed under section 30-1-703 or 30-1-707, Idaho Code, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(3) Special shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(4) Only business within the purpose or purposes described in the meeting notice required by section 30-1-705(3), Idaho Code, may be conducted at a special shareholders' meeting.

History.

I.C., § 30-1-702, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 10, p. 907.

ABA OFFICIAL COMMENT

Any meeting other than an annual meeting is a special meeting under section 702. The principal formal differences between an annual and a special meeting are that at an annual meeting directors are elected and, subject to the special notice requirements of section 705(2), any relevant issue pertaining to the corporation may be considered, while a special meeting must be called for specific purposes and may only consider matters within those purposes.

1. WHO MAY CALL A SPECIAL MEETING. A special meeting may be called under section 702(1) by the board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws. Typically, the person or persons holding certain designated offices within the corporation, e.g., the president, chairman of the board of directors, or chief executive officer, are given authority to call special meetings of the shareholders. In addition, the holders of at least 20 percent of the votes entitled to be cast on a proposed issue at the special meeting may require the corporation to hold a special meeting by signing, dating, and delivering one or more writings that demand a special meeting and set forth the purpose or purposes of the desired meeting. That percentage may be decreased or increased (but to not more than 33 ⅓ percent) by a provision in the articles of incorporation fixing a different percentage. Shareholders demanding a special meeting do not have to sign a single piece of paper, but the writings signed must all describe essentially the same purpose or purposes. Revocations of written demands will be effective if delivered to the corporation in the manner contemplated by section 141(4) and received before the corporation receives the requisite number of demands requiring that a special meeting be called. However, revocations received after that time will be a nullity and shall be given no effect. Upon receipt of writings evidencing a demand by holders with the requisite number of votes, the corporation (through an appropriate officer) must call the special meeting at a reasonable time and place. The shareholders' demand may suggest a time and place but the final decision on such matters is the corporation's. If no meeting is held within the time periods specified in section 703, the shareholders may obtain a summary court order under that section requiring that the meeting be held.

Section 702(2) fixes a record date for determining the shareholders entitled to sign a demand for a special shareholders' meeting. Unless a record date is otherwise fixed for this purpose, the record date is the date the first shareholder signs the demand. If a shareholder initially signs a demand but later seeks to withdraw his demand, the corporation may permit the shareholder to do so.

2. DISCRETION AS TO CALLS OF SPECIAL MEETING. Under section 702(1)(b) it is possible that more than one faction of shareholders may demand meetings at roughly the same time or that a single (or changing) faction of shareholders may request consecutive, overlapping, or repetitive meetings. The responsible corporate officers have some discretion as to the call and purposes of a meeting, and where demands are repetitious or overlapping, they may refuse to call a meeting for a purpose identical or similar to a purpose for which a previous special meeting was held in the recent past. Similarly, they may decline to call a special meeting when an annual meeting will be held in the near future. This limited discretion of the corporation to deny repetitive or overlapping demands may ultimately be tested under section 703, which itself gives the court discretion whether or not to compel the holding of a special meeting under these circumstances. See the Official Comment to section 703.

3. THE BUSINESS THAT MAY BE CONDUCTED AT A SPECIAL MEETING. Section 705(3) provides that a notice of a special meeting must include a "description of the purpose or purposes for which the meeting is called." Section 702(4) states that only business that is within that purpose or those purposes may be conducted at the special meeting. The word "within" was chosen, rather than a broader phrase like "reasonably related to," to describe the relationship between the notice and the authorized business to assure a shareholder who does not attend a special meeting that new or unexpected matters will not be considered in his absence.

IDAHO REPORTER'S COMMENT

Model Act § 702 deals with special shareholders' meetings much more systematically than prior Idaho §§ 30-1-28 and 29. As to who may call a special meeting, subsection (1) preserves the core of the existing provisions, including the 20% shareholder demand figure rather than the 10% in the ABA Official Text, but rephrases it in terms of entitlement to vote "on any issue proposed to be considered" at a special meeting. The ABA Committee's idea here seems to be to recognize the possibility that different voting groups may be entitled to vote on different issues. In addition, the word "votes" is substituted for "shares" to accommodate possible multiple or fractional votes per share. Subsection (1) also makes clear that the special meeting "shall" be called upon the requisite shareholder demand, not merely "may" be called (the prior § 28 language). Section 702(2) sets forth a record date for determining whether the twenty percent demand figure has been met, a matter not addressed in our prior Act.

Subsection (3) simply restates existing statutory law, while subsection (4) expresses what is implied by the prior § 28 requirement that a notice of a special meeting must state its purpose(s).

The 2004 amendment, adding to subsection (1)(b) the proviso and the final sentence, permits a lower percentage (without limit) or a higher percentage not exceeding 33 ⅓ %. This change gives corporations greater flexibility to prevent the occasional abusive use of the special meeting demand procedure by a relatively small minority of shareholders, while at the same time preserving for shareholders a significant director recall mechanism.

The 2004 amendment to I.C. § 30-1-702 also added a new provision permitting revocations of written demands for a special meeting, provided that such revocations are received prior to the receipt of demands sufficient in number to require the holding of a special meeting.

30-1-703. Court-ordered meeting. — (1) The Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may summarily order a meeting to be held:

(a) On application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within fifteen (15) months after its last annual meeting; or

(b) On application of a shareholder who signed a demand for a special meeting valid under section 30-1-702, Idaho Code, if:

(i) Notice of the special meeting was not given within thirty (30) days after the date the demand was delivered to the corporation's secretary, or

(ii) The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

History.

I.C., § 30-1-703, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 8, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "where a corporation's principal office is located, or, if none in this state, Ada county" for "where a corporation's principal office, or, if none in this state, its registered office, is located" in the introductory paragraph in subsection (1).

ABA OFFICIAL COMMENT

Section 703 provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting as required by section 701 or 702. A shareholder entitled to participate in a meeting may apply for a summary court order to command the holding of a meeting if (1) an annual meeting is not held within 15 months after the corporation's last annual meeting, or (2) a special meeting is not properly noticed within 30 days after a valid demand is delivered to the secretary of the corporation or, if properly noticed, is not held in accordance with the notice. Since a meeting must be held within 60 days of the notice date under section 705, the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days.

1. THE COURT WITH JURISDICTION TO ADMINISTER SECTION 703. The identity of the specific court with jurisdiction to order a shareholder's meeting under section 703(1) must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. Generally, all matters relating to a corporation should be addressed to the court in the county where the corporation's principal office is located in the state or, if the corporation does not have a principal office in the state, to the court in the county in which its registered office is located.

2. THE DISCRETION OF THE COURT. The court has discretion under section 703 since the language of the statute is that the court "may summarily order" that a meeting be held. A court, for example, may refuse to order a special meeting if the specified purpose is repetitive of the purpose of a special meeting held in the recent past. See the Official Comment to section 702. Alternatively, the court may view the demand as a good faith request for reconsideration of an action taken in the recent past and may order a meeting to be held. Similarly, even though a demand for an annual meeting is not a formal prerequisite for an application for a summary order under this section, the court may withhold setting a time and date for the annual meeting for a reasonably short period in order to permit the corporation to do so.

3. BURDEN OF PROOF. In any event, a shareholder applying for a summary order to hold a meeting has the burden of showing that he is entitled to the order. In the case of a special meeting, he has the burden of showing that the demand was executed by the holders of at least 20 percent of the votes entitled to be cast on the record date and that the demand was duly delivered to the corporation's secretary.

4. NOTICE, TIME, PLACE, AND QUORUM REQUIREMENTS. If the court orders that a meeting be held, it may fix the time and place of the meeting, determine the voting groups entitled to participate in the meeting, set the record date, order notice to be given as required by section 705, and enter such other orders as may be appropriate for the holding of the meeting. The court may also establish the quorum requirements for specific matters to be considered at the meeting or direct that the votes represented at the meeting automatically constitute a quorum for the taking of any action without regard to section 725 or any provision to the contrary in the corporation's articles of incorporation or bylaws. The latter alternative prevents a holder of the majority of the votes (who may not desire that a meeting be held) from frustrating the court-ordered meeting by not attending to prevent the existence of a quorum. In order to prevent misunderstanding about a special quorum requirement, if one is imposed, it is appropriate for the court to order that the notice of the meeting state specifically and conspicuously that a special quorum requirement is applicable to the court-ordered meeting.

5. STATUS AS ANNUAL MEETING. The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with section 701, precluding all other shareholder requests for an annual meeting for that year.

IDAHO REPORTER'S COMMENT

The only provision in our prior Act dealing with a court-ordered shareholders' meeting was the second sentence in the second paragraph of prior I.C. §30-1-28, dealing only with annual

meetings, which provided that if an annual meeting is not held within any 18-month period the local District Court "might, on the application of any shareholder, summarily order a meeting to be held." New Model Act § 703 expands on this single existing sentence so that it covers both annual and special meetings and expressly authorizes the court to order the various "procedural" aspects of the meeting such as the record date, the shares entitled to vote, the form and content of the notice, and quorum requirements. In addition, with respect to failure to hold an annual meeting, the "standing" period requirement is reduced in the Official Text from "any 18-month period" to 6 months after fiscal year-end or 15 months after the last previous annual meeting. We have deleted the "6 months after fiscal year-end" alternative in subsection (1)(a).

30-1-704. Action without meeting. — (1) Action required or permitted by this chapter to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one (1) or more written consents bearing the date of signature and describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) If not otherwise fixed under section 30-1-703 or 30-1-707, Idaho Code, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (1) of this section. No written consent shall be effective to take the corporate action referred to therein unless, within sixty (60) days of the earliest date appearing on a consent delivered to the corporation in the manner required by this section, written consents signed by all shareholders entitled to vote on the action are received by the corporation. A written consent may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of unrevoked written consents sufficient in number to take corporate action.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(4) If this chapter requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least ten (10) days before the action is taken. The notice must contain or be accompanied by the same material that, under this chapter, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.

History.
I.C., § 30-1-704, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 11, p. 907.

JUDICIAL DECISIONS

Cited in: Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

ABA OFFICIAL COMMENT

Section 704 provides that all the shareholders entitled to vote on an issue may validly act by unanimous written consent without a meeting. Unanimous written consent is obtainable, as a

practical matter, only on matters on which there are only a relatively few shareholders entitled to vote.

Section 704 is based on the fundamental premise that if all the voting shareholders desire some action to be taken, no purpose is served by requiring the formality of holding a meeting of shareholders. Action by unanimous written consent has the same effect as a meeting vote and may be described as such in any document, including documents delivered to the secretary of state for filing. Section 704 is applicable to any shareholder action, including, without limitation, election of directors, approval of mergers or sales of substantially all the corporate property not in the ordinary course of business, amendments of articles of incorporation, and dissolution.

1. FORM OF WRITTEN CONSENT. To be effective, consents must be in writing, dated, signed by all the shareholders entitled to vote, and delivered to the corporation in the manner contemplated by section 141(4). The phrase 'one or more written consents' is included in section 704(1) to make it clear that all shareholders do not need to sign the same piece of paper. The record date for determining who is entitled to vote, if not otherwise fixed by or in accordance with the by-laws, is the date the first shareholder signs the consent. To minimize the possibility that action by unanimous written consent will be authorized by action of persons who may no longer be shareholders at the time the action is taken, section 704(2) requires that all consents be signed within 60 days of the earliest signature date appearing on the consents delivered to the corporation.

2. REVOCATION OF CONSENT. Action by unanimous written consent is effective only when the last shareholder has signed the appropriate written consent and all consents have been delivered to the corporation in the manner contemplated by section 141(4). Before that time, any shareholder may withdraw his consent simply by advising the corporation in writing of that fact. Cf. *Calumet Industries, Inc. v. McClure*, 464 F. Supp. 19 (N.D. Ill. 1978). The withdrawal of a single consent, of course, destroys the unanimous written consent required by this section. If a shareholder seeks to withdraw his consent after all shareholders have signed written consents and filed them with the corporation, such withdrawal will be a nullity and shall be given no effect.

3. CONSENT TO FUNDAMENTAL CORPORATE CHANGES. Section 704 is applicable to all shareholder actions, including the approval of fundamental corporate changes described in parts 10, 11, 12, and 14. If these actions were taken at an annual or special meeting, shareholders who were not entitled to vote on the matter would nevertheless be entitled to receive notice of the meeting, including a description of the transaction proposed to be considered at the meeting. See, e.g., sections 1003 (notice of proposed amendment), 1103 (notice of proposed merger). In order to ensure that nonvoting shareholders have essentially the same right if action is taken by consent rather than at a meeting, section 704(4) provides that all nonvoting shareholders must be given at least 10 days' written notice of the fundamental corporate changes that are proposed for approval by consent.

IDAHO REPORTER'S COMMENT

Without changing any of the substance of prior IC. §30-1-145, new Model Act § 704 considerably expands upon old § 145 by adding new express provisions for many aspects of the unanimous consent procedure. Thus, new subsection (1) expressly recognizes that consents may be represented by multiple counterparts rather than a single document or piece of paper. And new subsection (2) adds a record date provision for determining which shareholders must consent. Further, new subsection (4) integrates the unanimous consent procedure with the requirement in other sections of the new Model Act that nonvoting shareholders receive notice of certain proposed fundamental changes before they are made.

The 2004 amendments to section 704 did three things designed to bring greater certainty to the written consent process: (1) Added a specific requirement that written consents to take shareholder action by unanimous written consent bear the date of signature of the consent. (2) Limited the effectiveness of a written consent to 60 days from the earliest date appearing on a consent delivered to the corporation. (3) Clarified that a revocation of a written consent is effective only if it is received before the corporation receives unrevoked consents sufficient in number to take corporate action.

30-1-705. Notice of meeting. — (1) A corporation shall notify shareholders of the date, time and place of each annual and special shareholders' meeting no fewer than ten (10) nor more than sixty (60) days before the meeting date. Unless this chapter or the articles of incorporation require

otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(2) Unless this chapter or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(3) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(4) If not otherwise fixed under section 30-1-703 or 30-1-707, Idaho Code, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(5) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 30-1-707, Idaho Code, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date.

History.

I.C., § 30-1-705, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Shareholders entitled to notice must be given notice of annual and special meetings pursuant to section 705 unless the notice is waived pursuant to section 706. Notice must be given at least 10 but not more than 60 days before the meeting date.

1. SHAREHOLDERS ENTITLED TO NOTICE. Generally, only shareholders who are entitled to vote at a meeting are entitled to notice. Thus, notice usually needs to be sent only to holders of shares entitled to vote for an election of directors or generally on other matters (in the case of an annual meeting), and on matters within the specified purposes set forth in the notice (in the case of a special meeting), and only to holders of shares of those classes or series of shares on the record date. The last sentence of section 705(1), however, recognizes that other sections of the Act require that notice of meetings at which certain types of fundamental corporate changes are to be considered must be sent to all shareholders, including holders of shares who are not entitled to vote on any matter at the meeting. See sections 1003, 1103, 1202, and 1402. In addition, the articles of incorporation may require that notice of meetings be given to all or specified voting groups of shareholders who are not entitled to vote on the matters considered at those meetings.

2. STATEMENT OF MATTERS TO BE CONSIDERED AT AN ANNUAL MEETING. Notice of all special meetings must include a description of the purpose or purposes for which the meeting is called and the matters acted upon at the meeting are limited to those within the notice of meeting. By contrast, the notice of an annual meeting usually need not refer to any specific purpose or purposes, and any matter appropriate for shareholder action may be considered. As recognized in subsection (2), however, other provisions of the revised Model Act provide that certain types of fundamental corporate changes may be considered at an annual meeting only if specific reference to the proposed action appears in the notice of meeting. See sections 1003, 1103, 1202, and 1402. In addition, if the board of directors chooses, a notice of an annual meeting may contain references to purposes or proposals not required by statute. In either event, if a notice of an annual meeting refers specifically to one or more purposes, the meeting is not limited to those purposes.

3. RECORD DATE. Section 705(4) is a catch-all record date provision for both annual and special meetings. If the record date for notice and for voting entitlement is not otherwise fixed pursuant to sections 703 or 707, the record date for purposes of determining who is entitled to notice and to vote at the meeting is the close of business on the day before the notice is mailed to the voting groups of shareholders. If notice is mailed to shareholders over a period of more than one day, the day before the notice is delivered to the first shareholders is the record date.

The selection of the close of business on the day before the notice is mailed as the catch-all record date is intended to permit the corporation to mail notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day. For this reason, this section is not inconsistent with the general principle set forth in the last sentence of section 707(1) that the board of directors may not fix a retroactive record date.

4. NOTICE OF ADJOURNED MEETINGS. Section 705(5) provides rules for adjourned meetings and determines whether new notice must be given to shareholders. Under this subsection a meeting may be adjourned to a different date, time, or place without additional notice to the shareholders (unless the bylaws require otherwise) if the new date, time, or place is announced before adjournment. But new notice is required if a new record date is or must be fixed under section 707(3). If a new record date is or must be fixed, the 10-to-60-day notice requirement and all other requirements of section 705 must be complied with as notice is given to the persons who are shareholders as of the new record date. A new quorum for the adjourned meeting must also be established. See section 725.

Section 725 provides that if a quorum exists for a meeting, it is deemed to continue to exist automatically for an adjourned meeting unless a new record date is or must be set for the adjourned meeting.

IDAHO REPORTER'S COMMENT

The changes from prior I.C. §§ 30-1-29 and 30 made by new Model Act § 705 are not of great substance and include the following:

(1) The maximum notice period in subsection (1) is expanded from 50 to 60 days before the meeting, in the ABA Committee's words, "primarily for the benefit of corporations with very large numbers of shareholders."

(2) Detail with respect to the actual mechanics of the notice-giving is deleted since it is covered by a comprehensive notice section for the entire new Model Act, section 141.

(3) New subsection (4), which provides a record date where the board has not formerly fixed one, is a simplification of prior I.C. § 30-1-30's fourth sentence.

(4) New subsection (5), which provides that a determination of shareholders entitled to vote may apply to an adjourned meeting, is a significant revision from prior § 30's last sentence and is from the California Corporations Code.

30-1-706. Waiver of notice. — (1) A shareholder may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) A shareholder's attendance at a meeting:

(a) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting;

(b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

History.

I.C., § 30-1-706, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 706(1) permits any shareholder to waive any notice required by section 705 by a written waiver, signed by the shareholder and delivered to the corporation. A waiver is effective even though it is signed at or after the time set for the meeting.

1. INFORMAL WAIVER OF NOTICE. A notice of shareholder meetings serves two principal purposes: (1) it advises shareholders of the date, time, and place of the annual or

special meeting, and (2) in the case of a special meeting (or an annual meeting at which fundamental changes may be made), it advises shareholders of the purposes of the meeting. If a shareholder attends a meeting, he has probably received some form of notice of the date, time, and place of the meeting whether from the corporation or from another source. As a result, section 706(2)(a) provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place of any meeting. Defects waived by attendance for this purpose include a failure to send the notice altogether, delivery to the wrong address, a misstatement of the date, time, or place of the meeting, and a failure to notice the meeting within the time periods specified in section 705(1). If a shareholder believes that the defect in or failure of notice was in some way prejudicial, he may preserve his objection by stating at the beginning of the meeting that he objects to holding the meeting or transacting any business. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by section 705.

For purposes of this section, "attendance" at a meeting involves the presence of the shareholder in person or by proxy. A shareholder who attends a meeting solely for the purpose of objecting to the notice may be counted as present for purposes of determining whether a quorum is present. See the Official Comment to section 725.

In the case of special meetings, or annual meetings at which fundamental corporate changes are considered, a second purpose of the notice is to tell shareholders what is to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting obviously cannot be raised until the matter is presented. Thus section 706(2)(b) provides that a shareholder waives this kind of objection if he fails to object promptly after the matter is first presented. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or obtaining written waivers of notice from all shareholders. Of course, whether or not a specific matter is within a stated purpose of a meeting is ultimately a matter for judicial determination, typically in a suit to invalidate action taken at the meeting brought by a shareholder who was not present at the meeting or who was present at the meeting and preserved his objection under section 706(2).

The purpose of both waiver rules in section 706(2) is to require shareholders with technical objections to holding the meeting or considering a specific matter to raise them at the outset and not reserve them to be raised only if they are unhappy with the outcome of the meeting. The rules set forth in this section differ in some respects from the waiver rules for directors set forth in section 823 where a waiver is inferred if the director acquiesces in the action taken at a meeting even if he raised a technical objection to the notice of a meeting at the outset.

2. WAIVER OF NOTICE WHERE FUNDAMENTAL CORPORATE ACTIONS ARE CONSIDERED. Other sections of the Model Act require that shareholders who are not entitled to vote are entitled to notice of meetings at which certain fundamental corporate changes are to be considered. See sections 1003, 1103, 1202, and 1402. In order to obtain an effective waiver of notice for these meetings under this section, waivers must be obtained from the nonvoting shareholders who are entitled to notice as well as from the voting shareholders.

IDAHO REPORTER'S COMMENT

New Model Act § 706 subsection (1) is based on section 144 of the 1969 Model Act [prior I.C. § 30-1-144], with only stylistic changes.

New subsection (2), however, is entirely new and deals in a comprehensive manner with the issue of implying waiver from attendance at the meeting.

30-1-707. Record date. — (1) The bylaws may fix or provide the manner of fixing the record date for one (1) or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(2) A record date fixed under this section may not be more than seventy (70) days before the meeting or action requiring a determination of shareholders.

(3) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless

the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting.

(4) If a court orders a meeting adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

History.
I.C., § 30-1-707, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 707 authorizes the board of directors to fix record dates for any action unless the bylaws themselves fix or provide for the fixing of a record date. A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to participate in the meeting. If neither the bylaws nor the board of directors fix a record date for a specific action, the section of this Act that deals with that action itself fixes the record date. For example, section 705(4), relating to giving notice of a meeting, provides that the record date for determining who is entitled to notice of a meeting (if not fixed by the directors or the bylaws) is the close of business on the day before the date the corporation first gives notice to shareholders of the meeting.

A record date may not be fixed more than 70 days before the meeting or action in question and may not be fixed retroactively. Once set, the same record date may be utilized for an adjournment of the meeting that reconvenes within 120 days after the date fixed for the original meeting or the board of directors may fix a new record date. If the adjourned meeting takes place more than 120 days after the date fixed for the original meeting, section 707(3) requires that a new record date be fixed. But if an adjournment is ordered by a court, section 707(4) allows the court to provide that the original record date continues to be applicable or to fix a different date. In any event, if a different record date is or must be fixed under this section, section 705 requires that new notice be given to the persons who are shareholders as of the new record date, and section 725 requires that a quorum be reestablished for that meeting.

IDAHO REPORTER'S COMMENT

New Model Act § 707, subsection (1) deletes the obsolete alternative of closing the transfer books but otherwise generally follows the substance of prior I.C. § 30-1-30 (1969 Model Act § 30), with numerous stylistic changes.

New subsection (2) is also based on prior § 30 but increases the maximum lead time for a record date from 50 to 70 days, in the words of the ABA Committee "to accommodate the needs of the very large publicly held corporations."

New subsections (3) and (4) significantly change the substance of prior § 30's last sentence on record dates for adjourned meetings.

30-1-708. Conduct of the meeting. — (1) At each meeting of shareholders, a chair shall preside. The chair shall be appointed as provided in the bylaws or, in the absence of such provision, by the board.

(2) The chair, unless the bylaws provide otherwise, shall determine the order of business and shall establish rules for the conduct of the meeting.

(3) The rules adopted for, and the conduct of, the meeting shall be fair to shareholders.

(4) The chair of the meeting shall announce at the meeting when the polls close for each matter voted upon. If no announcement is made, the polls shall be deemed to have closed upon the final adjournment of the meeting.

After the polls close, no ballots, proxies or votes nor any revocations or changes thereto may be accepted.

History.
I.C., § 30-1-708, as added by 2004, ch. 324, § 12, p. 907.

ABA OFFICIAL COMMENT

Section 708 provides that, at any meeting of the shareholders, there shall be a chair who shall preside over the meeting. The chair is appointed in accordance with the bylaws. Generally, the chair of the board of directors presides over the meeting. However, the bylaws could provide that the chief executive officer, if different than the chair of the board, preside over the meeting and they should provide a means of designating an alternate if that individual is for any reason unable to preside.

Section 708(2) gives the chair, unless the articles of incorporation or bylaws provide otherwise, the authority to determine in what order items of business should be discussed and decided. Inherent in the chair's power to establish rules for the conduct of the meeting is the authority to require that the order of business be observed and that any discussion or comments from shareholders or their proxies be confined to the business item under discussion. However, it is also expected that the chair will not misuse the power to determine the order of business and to establish rules for the conduct of the meeting so as to unfairly foreclose the right of shareholders—subject to the Act, the articles of incorporation and the bylaws—to raise items which are properly a subject for shareholder discussion or action at some point in the meeting prior to adjournment.

The Act provides that only business within the purpose or purposes described in the meeting notice may be conducted at a special shareholders' meeting. See sections 702(4) and 705(3). In addition, a corporation's articles of incorporation or, more typically, its bylaws, may contain advance notice provisions requiring that shareholder nominations for election to the board of directors or resolutions intended to be voted on at the annual meeting must be made in writing and received by the corporation a prescribed number of days in advance of the meeting. Such advance notice bylaws are permitted provided (1) there is reasonable opportunity for shareholders to comply with them in a timely fashion, and (2) the requirements of the bylaws are reasonable in relationship to corporate needs.

Among the considerations to be taken into account in determining reasonableness are (a) how and with what frequency shareholders are advised of the specific bylaw provisions, and (b) whether the time frame within which director nominations or shareholder resolutions must be submitted is consistent with the corporation's need, if any, (i) to prepare and publish a proxy statement, (ii) to verify that the director nominee meets any established qualifications for director and is willing to serve, (iii) to determine that a proposed resolution is a proper subject for shareholder action under the Act or other state law, or (iv) to give interested parties adequate opportunity to communicate a recommendation or response with respect to such matters, or to so-licit proxies. Whether or not an advance notice provision has been adopted, if a public company receives advance notice of a matter to be raised for a vote at an annual meeting, management may exercise its discretionary authority only in compliance with SEC Rule 14a-4(c)(1) adopted under the Securities Exchange Act of 1934.

Section 708(2) also provides that the chair shall have the authority to establish rules for the conduct of the meeting. Complicated parliamentary rules (such as Robert's Rules of Order) ordinarily are not appropriate for shareholder meetings. The rules may cover such subjects as the proper means for obtaining the floor, who shall have the right to address the meeting, the manner in which shareholders will be recognized to speak, time limits per speaker, the number of times a shareholder may address the meeting, and the person to whom questions should be addressed. The substance of the rules should be communicated to shareholders prior to or at the beginning of the meeting. The chair is entitled to wide latitude in conducting the meeting and, unless inconsistent with a previously prescribed rule, may set requirements, observe practices, and follow customs that facilitate a fair and orderly meeting. Since, absent a modifying bylaw provision, the chair has exclusive authority with respect to the rules for and the conduct of the meeting, rulings by the chair may not be overruled by shareholders. On the other hand, any rule for or conduct of the meeting which does not satisfy the fairness mandate of section 708(3) would be subject to a judicial remedy.

Section 708(4) requires that an announcement be made at the meeting of shareholders specifying when the polls will close for each matter voted upon. It also provides that, once the

polls close, no ballots, proxies, or votes and no changes thereto may be accepted. This statutory provision eliminates an area of uncertainty which had developed in the relatively sparse case law dealing with the effect of closing the polls, some of which suggested that, notwithstanding the closing of the polls, votes could be changed up until the time that the inspectors of election announced the results. *Young v. Jebbett*, 211 N.Y.S. 61 (N.Y. App. Div. 1925); *State ex rel. David v. Dailey*, 168 P.2d 330 (Wash. 1945). Any abusive use of the poll-closing power would be subject to judicial review under subsection (3) as well as under that line of cases requiring that meetings of shareholders be conducted fairly and proscribing inequitable manipulations of the shareholder voting machinery. See, e.g., *Duffy v. Loft, Inc.*, 151 A. 223 (Del. Ch. 1930); *Schnell v. Chris-Craft Ind., Inc.*, 285 A.2d 437 (Del. 1971).

IDAHO REPORTER'S COMMENT

Section 708, added in 2004, is a Model Act addition not included in our 1997 enactment. And it was a wholly new section created by the ABA Committee in 1996. Section 708 in effect establishes a simplified "mini-Robert's Rules" for the conduct of shareholders' meetings. These procedures seem designed for larger and publicly held corporations but also usable by the smaller and privately held companies that predominate in our state. As for "uniformity," only about a half dozen states (including one neighbor, Wyoming) appear to have statutes substantially identical to § 708. More states can be expected to go for Model Act uniformity in the 2004 "reform" climate, however.

More specifically, this section defines the role of the chair in presiding at meetings of shareholders, subject to differing provisions in a corporation's bylaws. In addition, it codifies the common law requirement that shareholder meetings be conducted in a manner which is fair to shareholders. Finally, it specifies procedures for closing of the polls and makes it clear that, once the polls have closed, no ballots, proxies or votes may be revoked or changed. All of these changes are proposed to maximize the likelihood that the annual meeting will be conducted in an orderly manner which is fair to all shareholders and that the results of voting at the meeting will not be cast into doubt as a result of votes submitted after the polls have been fairly closed.

30-1-709 — 30-1-719. [Reserved.]

30-1-720. Shareholders' list for meeting. — (1) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group, and within each voting group by class or series of shares, and show the address of and number of shares held by each shareholder.

(2) The shareholders' list must be available for inspection by any shareholder, at least ten (10) days before the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, his agent or attorney is entitled on written demand to inspect and, subject to the requirements of section 30-1-1602(3), Idaho Code, to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(3) The corporation shall make the shareholders' list available at the meeting, and any shareholder, his agent, or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a shareholder, his agent or attorney to inspect the shareholders' list before or at the meeting, or copy the list as permitted by subsection (2) of this section, the Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, on application of the shareholder, may summarily order the inspection or copying at the corporation's expense and may postpone the

meeting for which the list was prepared until the inspection or copying is complete.

(5) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

History.

I.C., § 30-1-720, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 9, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "where a corporation's principal office is located, or, if none in this state, Ada county" for "where a corporation's principal office, or, if none in this state, its registered office, is located" in subsection (4).

ABA OFFICIAL COMMENT

Section 720 requires the preparation of a list of shareholders entitled to notice of a meeting and requires that this list be made available on request to shareholders at least ten days before the meeting.

The list of shareholders is often referred to as the "voting list" and usually the list will include only the names of those shareholders entitled to vote at the meeting. The list, however, must also include the names and shareholdings of shareholders of nonvoting shares if they are entitled to notice of the meeting by reason of the nature of the actions proposed to be taken at the meeting. See section 705 and its Official Comment. Making the list of shareholders available before the meeting marks a change from the 1969 version of the Model Act. Through this device, a shareholder may learn the identity of the owners of substantial blocks of shares or the owners of shares similarly situated and communicate with them to see if his concerns are shared and should be pursued.

1. WHEN THE LIST MUST BE AVAILABLE. The list must generally be available for inspection at least 10 days before the meeting and continuously thereafter until the meeting occurs. If, however, notice of the meeting is waived by all the shareholders, the list need be available only at the meeting itself under section 720(3) unless one or more waivers are conditioned upon receipt of the list.

2. WHERE THE LIST MUST BE MAINTAINED. Section 720(2) permits the list to be maintained either at the corporation's principal office or at another location in the city in which the meeting is to be held, the precise location to be designated in the notice of meeting. If the corporation changes the location of its annual meeting, it thus may correspondingly change the location of the list of shareholders pursuant to this subsection.

Section 720(3) also requires a copy of the shareholders' list to be available at the meeting itself for inspection. This list may be used to determine attendance, the presence or absence of a quorum, and the right to vote.

3. THE FORM IN WHICH THE LIST IS MAINTAINED. Section 720 does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by this section.

4. CONSEQUENCES OF FAILING TO PREPARE THE LIST OR REFUSAL TO MAKE IT AVAILABLE. Section 720 creates a corporate obligation rather than an obligation imposed upon a corporate officer. If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, either before the meeting as required by section 720(2) or at the meeting itself as required by section 720(3), a shareholder may apply to the appropriate court under section 720(4) for a summary order permitting inspection of the list; the court may further order the meeting to be postponed for a reasonable time. If the court orders a copy of the list to be provided to the shareholders, the copying is at the corporation's expense; if the corporation produces the list voluntarily pursuant to section 720(2) or (3), any inspection and copying are at the shareholder's expense.

This judicial remedy is the only sanction for violation of section 720 since section 720(5) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting.

5. THE RIGHT TO OBTAIN A COPY OF THE LIST. Section 720(2) permits shareholders to "inspect" the list without limitation, but permits the shareholder to 'copy' the list only if the shareholder complies with the requirement of section 1602(3), that the demand be "made in good faith and for a proper purpose." The right to copy the list includes, if reasonable, the right to receive a copy of the list upon payment of a reasonable charge. See sections 1603(2) and (3). The distinction between "inspection" and "copying" set forth in section 720(2) reflects an accommodation between competing considerations of permitting shareholders access to the list before a meeting and possible misuse of the list.

6. RELATIONSHIP TO RIGHT TO INSPECT CORPORATE RECORDS GENERALLY. Section 720 creates a right of shareholders to inspect a list of shareholders in advance of and at a meeting that is independent of the rights of shareholders to inspect corporate records under part 16. A shareholder may obtain the right to inspect the list of shareholders as provided in part 16 without regard to the provisions relating to the pendency of a meeting in section 720, and similarly the limitations of part 16 are not applicable to the right of inspection created by section 720 except to the extent the shareholder seeks to copy the list in advance of the meeting.

The right to inspect under part 16 is also broader in the sense that in some circumstances the shareholder may be entitled to receive copies of the documents he may inspect. See section 1603.

IDAHO REPORTER'S COMMENT

New Model Act § 720 makes numerous stylistic changes from prior I.C. § 30-1-31 (1969 Model Act § 31). The major substantive change is extending the right of shareholders to inspect the shareholders' list for a limited period before the meeting. We have changed the Official Text period in subsection (2) from "beginning two business days after notice of the meeting is given" to "at least ten (10) days before the meeting."

New Section 720 also eliminates prior § 31's damage remedy for a shareholder injured by noncompliance and in new subsection (4) substitutes a summary judicial procedure in which the court may order the meeting to be postponed and the corporation to pay the costs of inspection and copying where it has failed to make available the required list. This new remedy seems more appropriate.

Additional changes here include greater detail as to the location of the shareholders' list, the form in which information must appear and the mechanics of inspection.

30-1-721. Voting entitlement of shares. — (1) Except as provided in subsections (2) and (4) of this section or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one (1) vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

(2) A corporation is not entitled to vote treasury shares. Absent special circumstances, the shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(3) Subsection (2) of this section does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(4) Redeemable shares are not entitled to vote after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

History.

I.C., § 30-1-721, as added by 1998, ch. 222, § 2, p. 764.

ABA OFFICIAL COMMENT

Section 721 deals with the entitlement of shareholders to vote, while section 722 deals with voting by proxy and section 724 establishes rules for the corporation's acceptance or rejection of proxy votes.

1. VOTING POWER OF SHARES. Section 721(1) provides that each outstanding share, regardless of class, is entitled to one vote per share unless otherwise provided in the articles of incorporation. See section 601 and its Official Comment. The articles of incorporation may provide for multiple or fractional votes per share, and may provide that some classes of shares are nonvoting on some or all matters, or that some classes have a single vote per share or different multiple or fractional votes per share, or that some classes constitute one or more separate voting groups and are entitled to vote separately on the matter.

The articles of incorporation may also authorize the board of directors to create classes or series of shares with preferential rights, which may be voting or nonvoting in whole or in part. See section 602 and its Official Comment.

Fractional or multiple votes per share, or nonvoting shares, are often used in the planning of business ventures, particularly closely held ventures, when the contributions of participants vary in kind or quality. It is possible through these devices, for example, to give persons with relatively small financial contributions a relatively large voting power within the corporation.

The power to vary or condition voting power is also often used to give increased protection to financial interests in the corporation. It is customary, for example, to make classes of shares with preferential rights nonvoting, but the power to vote may be granted to those classes if distributions are omitted for a specified period. This conditional right to vote may permit the class of shares with preferential rights to vote separately as a voting group to elect one or more directors or to vote with the shares having general voting rights in the election of the directors.

In order to reflect the possibility that shares may have multiple or fractional votes per share, all provisions relating to quorums, voting, and similar matters in the Model Act are phrased in terms of "votes" rather than "shares."

2. VOTING POWER OF NONSHAREHOLDERS. Under the last sentence of section 721(1), the power to vote cannot be granted generally to nonshareholders. The statutes of some states permit bondholders to be given the power to vote under certain specified circumstances; this option is not available under the Model Act. But creditors may in effect be given the power to vote, e.g., by creating a special class of redeemable voting shares for them, by creating a voting trust at the time the credit is extended with power in the creditors to name the voting trustees, by registering the shares in the name of the creditors as pledgees with power to vote, or by granting the creditors a revocable or irrevocable proxy to vote some or all of the outstanding shares. See the Official Comment to section 722.

3. CIRCULAR HOLDINGS. Section 721(2) prohibits the voting of shares held by a domestic or foreign corporation that is itself a majority-owned subsidiary of the corporation issuing the shares. The purpose of this prohibition is to prevent management from using a corporate investment to perpetuate itself in power. Similar public policy considerations may be present in situations where the issuing corporation owns a large but not a majority interest in the corporation voting the shares. The inclusion of section 721(2) is not intended to affect the possible application of common law principles that may invalidate circular holding situations not within its literal prohibition. As to the possible existence of these common law principles, see, e.g., *Cleveland Trust Co. v. Eaton*, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967), rev'd on the basis of statutory amendment, 20 Ohio St. 2d 129, 256 N.E.2d 198 (1970). The phrase "absent special circumstances" is included to enable a court to permit the voting of shares where it deems that the purpose of the section is not violated.

4. SHARES HELD IN A FIDUCIARY CAPACITY. Section 721(3) makes the prohibition against voting of circularly-owned shares of section 721(2) inapplicable to shares held in a fiduciary capacity. Compare Del. Gen. Corp. Law § 160(c). The Ohio statute involved in the *Eaton* case authorized a bank to vote its own shares that were held by it in a fiduciary capacity. A state may grant or prohibit such voting by another statute; section 721(3) provides only that such voting is not prohibited by the Model Act.

5. REDEEMABLE SHARES. Redeemable shares are often redeemed in connection with a transaction such as a merger or the issuance of a new senior class of shares that requires shareholder approval. Section 721(4) avoids subjecting a transaction to approval by a class of redeemable shares that will be redeemed as a result of the transaction if adequate provision has been made to ensure that the holders of the redeemable shares will in fact receive the amount payable to them on redemption.

IDAHO REPORTER'S COMMENT

In addition to stylistic changes from prior I.C. § 30-1-33 (1969 Model Act § 33) made throughout new Model Act § 721:

(1) The reference to treasury shares in current § 33(b) is deleted in the Official Text because new Official Text Chapter 6 eliminates that concept. We added the first sentence in subsection (2) above to the Official Text, since as explained in connection with part 6 we are retaining the concept of treasury shares.

(2) New subsection (2) restates that its prohibition is directed against circular voting power as such and not against mere circular ownership without voting power (less than majority ownership).

(3) New subsection (3) clarifies that subsection (2)'s prohibition does not apply to shares owned by the corporation as a fiduciary.

(4) New subsection (4) merely restates the substance of prior § 33(i).

30-1-722. Proxies. — (1) A shareholder may vote his shares in person or by proxy.

(2) A shareholder or his agent or attorney-in-fact may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which one can reasonably verify that the shareholder, the shareholder's agent, or the shareholder's attorney-in-fact authorized the transmission.

(3) An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election or the officer or agent of the corporation authorized to tabulate votes. An appointment is valid for eleven (11) months unless a longer period is expressly provided in the appointment form.

(4) An appointment of a proxy is revocable unless the appointment form or electronic transmission states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(a) A pledgee;

(b) A person who purchased or agreed to purchase the shares;

(c) A creditor of the corporation who extended it credit under terms requiring the appointment;

(d) An employee of the corporation whose employment contract requires the appointment; or

(e) A party to a voting agreement created under section 30-1-731, Idaho Code.

(5) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the inspector of election or the officer or agent of the corporation authorized to tabulate votes before the proxy exercises his authority under the appointment.

(6) An appointment made irrevocable under subsection (4) of this section is revoked when the interest with which it is coupled is extinguished.

(7) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he did not know of its existence when he acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(8) Subject to section 30-1-724, Idaho Code, and to any express limitation on the proxy's authority stated in the appointment form or electronic

transmission, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

History.
I.C., § 30-1-722, as added by 1997, ch. 366, § 2, p. 1080; am. 2001, ch. 62, § 1, p. 119; am. 2004, ch. 324, § 13, p. 907.

STATUTORY NOTES

Effective Dates.
Section 2 of S.L. 2001, ch. 62 declared an emergency. Approved March 19, 2001.

ABA OFFICIAL COMMENT

Section 722 provides that shareholders may vote in person or by proxy and establishes the basic rules for appointing a proxy. As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.

1. NOMENCLATURE. The word "proxy" is often used ambiguously, sometimes referring to the grant of authority to vote, sometimes to the document granting the authority, and sometimes to the person to whom the authority is granted. In the Model Act the word "proxy" is used only in the last sense; the terms "appointment form" and "electronic transmission" are used to describe the document or communication appointing the proxy; and the word "appointment" is used to describe the grant of authority to vote.

2. APPOINTMENT OF PROXY. A shareholder may appoint a proxy to vote by signing an appointment form, either personally or by his agent or attorney-in-fact. An electronic transmission which appoints a proxy is deemed the equivalent of a signed appointment form if it contains or is accompanied by information from which it can be reasonably verified that the transmission was authorized by the shareholder or by the shareholder's agent or attorney-in-fact. "Electronic transmission" as used in this section means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient. See section 140(7A). Section 722(2) is intended to sanction the practice whereby shareholders who have been provided in proxy materials with a personal identification number may call in their vote and identifying number to a person who, acting as the shareholder's agent, causes that information to be transmitted, directly or indirectly, to the inspector of election.

The appointment is effective when an appointment form or an electronic transmission (or documentary evidence thereof, including verification information) is received by the inspector of election or the officer or agent of the corporation authorized to receive and tabulate votes. The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form or electronic transmission contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See section 722(8).

3. DURATION OF PROXY. An appointment form that contains no expiration date is valid for 11 months. See section 722(3). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. But an appointment form may validly specify a longer period if the parties agree.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is "coupled with an interest." See section 722(4). Thus, an appointment may be revoked either expressly or by implication, as when a shareholder later executes a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on his own behalf. The revised Model Act does not attempt to codify these common law principles of agency law.

While death or incapacity of the appointing shareholder revokes an agency appointment under common law principles, section 722(5) modifies the common law rule to provide that the corporation may accept the vote of the proxy until the appropriate corporate officer or agent receives notice of the shareholder's death or incapacity. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, section 722(5) does not affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent. That relationship is governed by the law of agency independent of the Model Act.

4. IRREVOCABLE PROXIES. Section 722(4) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless "coupled with an interest." But section 722(4) provides considerable certainty since it describes several accepted forms of relationship as examples of "proxies coupled with an interest." These examples are not exhaustive and other arrangements may also be held to be "coupled with an interest." See Comment, "The Irrevocable Proxy and Voting Control of Small Business Corporations," 98 U. Pa. L. Rev. 401,405-7 (1950); see generally I Restatement of Agency (Second) § 138 (1958).

Section 722(6) provides that an irrevocable proxy is revoked when the interest with which it was coupled is extinguished—for example, by repayment of the loan or release of the pledge.

A transferee for value of shares that are subject to an irrevocable appointment takes free of the appointment if (1) he did not know of the existence of the appointment and (2) the existence of the irrevocable appointment was not noted conspicuously on the certificate or information statement. See section 722(7). Under this subsection, both the appointment and the irrevocable nature of the appointment must conspicuously appear on the certificate.

IDAHO REPORTER'S COMMENT

Model Act § 722 treats proxies even more comprehensively than did prior I.C. § 30-1-33, which in turn was more comprehensive than 1969 Model Act § 33. In addition to the usual purely stylistic changes, section 722 made the following modifications from old I.C. § 30-1-33:

(1) A new terminology is employed, distinguishing among "proxy," "appointment" and "appointment form."

(2) The express requirements in old I.C. § 30-1-33, subsections (c)(3) and (4) are deleted in section 722.

(3) The list of types of irrevocable proxies in subsection (4) is not exhaustive, unlike old subsection (c)(5).

(4) On irrevocable proxies becoming revocable, subsection (6) is a simplification compared to old subsection (c)(6).

Section 722 was amended in 2001 to recognize the increasing use of electronic transmission of proxy mechanisms and in 2004 to conform to Model Act structure and terminology.

30-1-723. Shares held by nominees. — (1) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

(2) The procedure may set forth:

(a) The types of nominees to which it applies;

(b) The rights or privileges that the corporation recognizes in a beneficial owner;

(c) The manner in which the procedure is selected by the nominee;

(d) The information that must be provided when the procedure is selected;

(e) The period for which selection of the procedure is effective; and

(f) Other aspects of the rights and duties created.

History.

I.C., § 30-1-723, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Traditionally, a corporation recognizes only the registered owner as the owner of shares. Indeed, section 140 defines "shareholder" basically as the registered owner of shares. But it has become a common practice for persons purchasing shares to have them registered in the "street name" of a broker-dealer or other financial institution, principally to facilitate transfer by eliminating the need for the beneficial owner's signature and delivery. In addition, in order to avoid the burdens of processing securities transfers, which caused a crisis in the securities

industry in the late 1960s, a system of securities depositories (defined as "clearing corporations" in section 8-102(3) of the Uniform Commercial Code) has been developed. In this system, financial institutions deposit securities with the depository, which becomes the registered owner of the shares. Transfers between depositories are then accomplished by book entry of the depository. As a result, there may be two entities interposed between the corporation and the beneficial owner with the depository being the registered owner for the account of the brokerage firm that in turn holds the shares for the account of the beneficial owner.

The purpose of section 723 is to facilitate direct communication between the corporation and the beneficial owner by authorizing the corporation to create a procedure for bypassing both the registered owner and intermediate brokerage firms. The adoption of this procedure is discretionary with each corporation and affirmative action by the corporation is necessary to accomplish it. The procedure is also discretionary with the shareholder, who must elect to follow the applicable procedure prescribed by the corporation. The shareholder retains all of his rights except those granted to the beneficial owner.

The corporation may limit or qualify the procedure as it deems appropriate. For example, the corporation may:

(1) limit the procedure to certain classes of shareholders, such as depositories, broker-dealers and banks, or their nominees, or make the procedure available to all shareholders;

(2) permit a shareholder to adopt the procedure with respect to some but not all of the shares registered in his name (and in that case he continues to be treated as the shareholder with respect to the balance);

(3) specify the purpose or purposes for which the certification is effective, e.g., for giving notice of, and voting at, shareholders' meetings, for the distribution of proxy statements and annual reports, or for payment of cash dividends;

(4) specify the form of the certification, e.g., a written list, computer tape, or some other form of compatible input;

(5) specify the type of information that must be provided, e.g., the name and address of the beneficial owner, his taxpayer identification number, and the number of shares registered directly in his name;

(6) establish deadlines for receipt of the certifications after the establishment of a record date so that the corporation may schedule its mailings;

(7) provide that a new certification is required following each record date or that a certification as of a certain date may continue until changed by the certifying shareholder.

This listing is illustrative and not exhaustive. It is expected that experimentation with various devices under this section may reveal other areas which the corporation's plan should address.

The definition of "shareholder" in section 140 includes beneficial owners to the extent they obtain the rights of shareholders pursuant to the procedure authorized by this section.

IDAHO REPORTER'S COMMENT

New Section 723 relocates the substance of prior I.C. § 30-1-2(f) to part 7 and expands on the mechanics and consequences of adopting a "nominee-beneficiary procedure."

30-1-724. Corporation's acceptance of votes. — (1) If the name signed on a vote, consent, waiver or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the shareholder.

(2) If the name signed on a vote, consent, waiver or proxy appointment does not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the shareholder if:

(a) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(b) The name signed purports to be that of an administrator, executor, guardian or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation

has been presented with respect to the vote, consent, waiver or proxy appointment;

(c) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment;

(d) The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver or proxy appointment;

(e) Two (2) or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name or at least one (1) of the co-owners and the person signing appears to be acting on behalf of all the co-owners.

(3) The corporation is entitled to reject a vote, consent, waiver or proxy appointment if the inspector of election or the officer or agent of the corporation authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(4) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver or proxy appointment in good faith and in accordance with the standards of this section or section 30-1-722(2), Idaho Code, are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, waiver or proxy appointment under this section or section 30-1-722(2), Idaho Code, is valid unless a court of competent jurisdiction determines otherwise.

History.

I.C., § 30-1-724, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 14, p. 907.

ABA OFFICIAL COMMENT

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments usually involve appointment forms for a proxy to vote the shares, but may also include waivers of notice, consents to action without a meeting, requests for a special meeting of shareholders, and similar instruments involving action by the shareholders. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large corporations with thousands of shareholders.

Section 724 establishes general rules permitting the corporation and its officers or agents to accept these instruments if they appear to be executed by the shareholder or by a person who has authority to execute the instrument for the shareholder and they are accompanied by whatever authenticating evidence the corporation reasonably requests. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation pursuant to section 206(2). Section 724(1) authorizes acceptance of an instrument if the name appearing on the instrument "corresponds" to the name of the shareholder, while section 724(2) permits the acceptance of an instrument executed by a person other than the shareholder if there is a designation or evidence of the capacity of the person executing the instrument that indicates the act of the person is the act of the shareholder. On the other hand,

section 724(3) permits rejection of an instrument if the officer or agent tabulating votes has a "reasonable basis for doubt" about the validity of the signature or about the authority of the person acting on behalf of the shareholder. These principles are described in greater detail below.

The purpose of section 724 is to protect the corporation and its officers or agents from liability for damages to the shareholder if action is taken in accordance with the section. Thus section 724(4) provides that there is no liability to the shareholder if the corporation's officer or agent, acting in good faith, accepts an instrument that meets the requirements of section 724(1) or (2) or accepts an electronic transmission authorized by section 722 (2), even if it turns out that the execution was invalid or unauthorized; similarly, no liability exists if the officer or agent, again acting in good faith, rejects an instrument because of a "reasonable basis for doubt," even though it turns out that the instrument was properly executed by the shareholder. But section 724 does not address the question whether an action was properly or improperly taken or approved, and section 724(5) makes clear that the validity or invalidity of corporate action is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. It is contemplated that any such suit will be brought promptly, typically before the corporate action is consummated or the corporation's position otherwise changes in reliance on the vote, and that any suit that is not brought promptly under the circumstances would normally be barred because of laches.

Similarly, section 724 does not address the liability of the proxy to the shareholder for exercising authority beyond that granted to him or for disobeying instructions. These matters are governed by the law of agency and not by section 724.

The American Society of Corporate Secretaries has established principles for the acceptance of proxy appointments in routine elections in which there is no proxy contest. Many of the examples of the application of section 724 set forth below are based on these principles.

1. EXAMPLES OF EXECUTIONS "CORRESPONDING WITH" THE NAME OF THE SHAREHOLDER. Assuming that shares are registered in the name of an individual, an instrument may be accepted as signed:

a. whether executed in ink, pencil, ball-point, crayon, etc;

b. regardless of where the signature appears on the instrument (whether or not in the space provided), if there is no reason to doubt the intent to execute;

c. whether the name is handwritten, handprinted, or rubber stamped in facsimile signature or printed form;

d. whether there are deviations between the registered name and the signature, provided that the deviations are not inconsistent with the registered name (for example, if the shares are registered in the name of "John F. Smith," the following are acceptable: "J. Foster Smith," "J. Smith," "J.F. Smith," "J.F.S.," "J.S.," "John F.," and even simply "Smith." Similarly, if "John Smith" is the name of the shareholder, "John F. Smith" and "J. Foster Smith" are also acceptable);

e. if marked by an "X" and witnessed by one other person;

f. the signature is illegible, unless it cannot reasonably be considered to be the signature of the shareholder (for example, if shares are registered in the name of "John F. Smith," the signature is not acceptable if the first letter of the signature is clearly an "M" or the first word is "Mark");

g. if it is a photocopy, facsimile transmission, or other reliable reproduction of a signed appointment form, provided that such a copy, facsimile transmission, or reproduction is a complete reproduction of the entire appointment form;

h. if the shares are registered in the maiden name of a woman, e.g., Mary Smith, and the instrument is executed:

(1) in her married name, clearly indicated as such, e.g., "Mary Smith Jones (formerly Mary Smith)" or "Mary Smith (now Mrs. Mary Smith Jones)";

(2) in her married name or in a form that implies her married status, e.g., "Mary Smith Anderson," "Mrs. Mary S. Anderson," "Mrs. Mary Smith Anderson," or "Mrs. Mary Anderson"; or

i. if the shares are registered in the name "Peter Smith, Sr." but the designation "Sr." is omitted, e.g., "Peter Smith." The execution "Peter Smith, Jr.," however, does not correspond with the shareholder.

2. EXAMPLES OF EXECUTIONS THAT "INDICATE THE CAPACITY" OF THE PERSON SIGNING.

In all the following instances, the corporation may request additional evidence of authority but is not required to do so; officers and agents are protected from liability if they routinely accept the instrument without requiring additional evidence.

a. Assuming that the shares are registered in the name of a partnership, e.g., "Smith Bros.," an instrument may be accepted if executed either in the form "Smith Bros. by John Able, Partner" or simply "Smith Bros."

b. Assuming that the shares are registered in the name of a corporation, e.g., "Smith Corporation," an instrument may be accepted if executed in the name of the corporation, by an officer or agent designated as holding a responsible position, by a person with a surname similar to the corporate name, or simply in the name of the corporation, e.g. , "Smith Corporation by John Able, President," "Smith Corporation by Peter Apt, Agent," "Smith Corporation by John Smith," or "Smith Corporation."

c. Assuming that the shares are registered in the name of an individual who is deceased, incompetent, a minor, in bankruptcy, or in receivership, an instrument may be accepted if it is executed by an executor, administrator, guardian, receiver, or trustee who signs as such. Shares registered in the name of a minor may be voted by a parent of the shareholder if he is identified as such, e.g., "Ralph Able by John Able, Father."

d. Assuming that the shares are registered in the name of an individual, an instrument may be accepted if it is executed by another individual who indicates (1) that he is signing as an agent or attorney-in-fact for the shareholder (see section 722); (2) that he has a close family or other relationship with the shareholder from which authority can be inferred; or (3) that he is the beneficial owner of shares, a pledgee of the shares, or a donee of the shares. For example: if shares are registered in the name of "Peter Jones," "Ed Smith, Agent," "Paul Smith, Son," "Mary Smith Jones, Wife," "Emelia Able, Attorney," "Arthur Peters, Private Secretary," "Paul Jones, Trustee under Deed of Trust dated April 1, 1980," or "Mary Smith, Donee," are all acceptable absent some indication that the execution was unauthorized.

e. Assuming that the shares are registered in the names of two or more persons--as joint tenants or tenants in common, executors or administrators, guardians or conservators, a committee for an incompetent, or trustees--an instrument may be accepted if signed by or on behalf of fewer than all the persons named. This conclusion proceeds on the assumption that the signer or signers have authority to act for the others and there is nothing on the face of the instrument that rebuts this assumption.

3. EXAMPLES OF "REASONABLE BASIS FOR DOUBT". The phrase "reasonable basis for doubt" about the validity of a signature or about the signer's authority creates an objective standard for the exercise of the authority granted by section 724(3) to reject proffered instruments. In the absence of a proxy fight or a seriously contested issue, instruments should be rejected only if there seems to be no basis for finding the execution regular on its face. In a proxy fight or other contested issue, the possibility of illegal or unauthorized execution is greatly increased, and a more cautious attitude should therefore be adopted. The following are examples in which a "reasonable basis for doubt" could be found to exist:

a. The shares are registered in the name of "John F. Smith" and the instrument is executed by "Joseph F. Smith" or by "Frank W. Smith."

b. The shares are registered in the name of "Ellen Smith, a Minor" or "John Smith, Custodian for Ellen Smith, a Minor," and the instrument is executed by "Ellen Smith." There is no "reasonable basis for doubt," however, if the instrument is accompanied by evidence satisfactory to the corporation that the shareholder is no longer a minor.

c. A proxy appointment is received that is regular on its face, and the secretary or other corporate officer or agent receives a telephone call from a person who identifies himself as the shareholder and says either that he wishes to revoke the appointment or that he did not authorize its original execution.

d. Shares are registered in the name of two or more persons as coowners, the instrument is executed by fewer than all of them, and the instrument shows on its face that not all the registered owners granted authority to the signers, as where the instrument states that it was not possible to obtain all the coowners' signatures or that some refused to sign. For the normal rule of acceptability of proxies executed by fewer than all coowners, however, see section 724(2)(e) and part 2(e) of this Official Comment.

e. The corporation receives a copy of letters of appointment of a receiver, executor, administrator or other fiduciary, and the instrument is executed in the name of the shareholder rather than by the fiduciary.

4. OTHER PRINCIPLES APPLICABLE TO PROXY APPOINTMENTS. As indicated in the Official Comment to section 722, a proxy is simply an agent of the shareholder, and his appointment therefore involves primarily the law of agency. The law of agency determines the rights and duties of the shareholder and the proxy, and it is important to recognize that section 724 is not intended to affect these rights and duties. Rather, it recognizes that the great bulk of instruments executed in the name of a shareholder or on his behalf are in fact authorized and the corporation and its officers should be encouraged to accept them rather than to adopt unduly narrow requirements.

IDAHO REPORTER'S COMMENT

New Model Act § 724 is basically an entirely new section intended to provide rules for

corporations when called upon to accept written instruments as evidence of voting or other action by or on behalf of a shareholder. This matter was not treated systematically in earlier revisions of the Model Act but was treated partially in some state statutes, like prior I.C. §30-1-33. For example, new subsection (2) treats the same problems that are dealt with in prior I.C. §30-1-33(e),(f),(g) and (h). The new treatment seems an improvement in terms of organization and specific detail.

30-1-725. Quorum and voting requirements for voting groups. — (1) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this chapter provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(2) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(3) If a quorum exists, action on a matter, other than the election of directors, by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this chapter requires a greater number of affirmative votes.

(4) An amendment of articles of incorporation adding, changing or deleting a quorum or voting requirement for a voting group greater than specified in subsection (1) or (3) of this section is governed by section 30-1-727, Idaho Code.

(5) The election of directors is governed by section 30-1-728, Idaho Code.

History.

I.C., § 30-1-725, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 725 establishes general quorum and voting requirements for voting groups for purposes of the Act. As defined in section 140, a "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter (that is, all shares entitled to vote on the matter by the articles of incorporation or the Act that do not expressly have the right to be counted or tabulated separately) are a single voting group. The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of the Act. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 725. See section 726(1).

The voting group concept permits a single section of the revised Model Act to deal with quorum and voting rules applicable to a variety of single and multiple voting group situations. Section 725 covers, for example, quorum and voting requirements for all actions by the shareholders of a corporation with a single class of voting shares; it also covers quorum and voting requirements for a matter on which only a class of shares with preferential rights is entitled to vote under the articles of incorporation because of a default in the payment of dividends (a vote which is often described as a "class vote"); and it covers quorum and voting requirements for a matter on which both common and preferred shares are entitled to vote, either together as a single voting group under the articles of incorporation or separately as two voting groups under either the articles of incorporation or the Act.

1. DETERMINATION OF VOTING GROUPS UNDER THE MODEL ACT. Under the Revised Model Act, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But sections 1004 and 1103 of the Act grant classes or series of shares the right to vote separately when fundamental changes are proposed that may adversely affect that class. Section 1004 provides, further, that when two or more series are affected in essentially the same way, the series are lumped together and must vote as a single voting group rather than as multiple voting groups on the matter. Under the revised Model Act even a class or series of shares that is expressly described as nonvoting under the articles of incorporation may be entitled to vote separately on a matter affecting the class or series in a designated way. See section 1004(5).

In addition to the provisions of the Act, separate voting by voting group may be authorized by the articles of incorporation in such instances and on such terms as may be desired (except that the statutory privilege of voting by separate voting groups cannot be diluted or reduced). Finally, on some matters the board of directors may condition their submission of matters to shareholders on their approval by specific voting groups designated by the board of directors. Sections 725 and 726 establish the mechanics by which all voting by single or multiple voting groups is carried out.

In some situations, shares of a single class may be entitled to vote in two different voting groups. See the Official Comment to section 726.

2. QUORUM AND VOTING REQUIREMENTS IN GENERAL. Implicit in section 725 is the concept that the determination of the voting groups entitled to vote, and the quorum and voting requirements applicable thereto, must be determined separately for each "matter" coming before a meeting. As a result, different quorum and voting requirements may be applicable to different portions of a meeting, depending on the matter being considered. In this respect, sections 725 and 726 differ in structure from earlier versions of the Model Act and state statutes which contemplated that a single set of quorum and voting requirements would be applicable to a "meeting." There is no difference in substance, however, since it was generally recognized that different quorum and voting requirements should be applicable in class voting situations. And, under the revised Model Act, in the normal case where only a single voting group is entitled to vote on all matters coming before a meeting of shareholders, a single quorum and voting requirement will usually be applicable to the entire meeting.

3. QUORUM REQUIREMENTS FOR ACTION BY VOTING GROUP. Sections 725(1) and (2) provide standard rules for the determination of a quorum for each voting group required to act at a shareholders' meeting on a matter. In the absence of a provision in the articles of incorporation, section 725(1) provides that a quorum consists of a majority of the votes entitled to be cast on the matter at the meeting.

Section 725(2) retains the common law view that once a share is present at a meeting, it is deemed present for quorum purposes throughout the meeting. Thus, a voting group may continue to act despite the withdrawal of persons having the power to vote one or more shares in an effort "to break the quorum." In this respect, a meeting of shareholders is governed by a different rule than a meeting of directors, where a sufficient number of directors must be present to constitute a quorum at the time action is taken. See section 824 and its Official Comment.

Once a share is present at a meeting it is also deemed to be present at any adjourned meeting unless a new record date is or must be set for that adjourned meeting. See section 707. If a new record date is set, new notice must be given to holders of shares of a voting group and a quorum must be established from within the holders of shares of that voting group on the new record date.

The shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice may be counted toward the presence of a quorum. Similarly, the holdings of a shareholder who attends a meeting solely for purposes of raising the objection that a quorum is not present is counted toward the presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice. Such waivers are governed by section 706(2).

As used in sections 725 and 726, "represented at the meeting" means the physical presence of the shareholder (whether in person or by his written authorization) in the meeting room after the meeting has been called to order or the presiding officer has commenced consideration of the business of the meeting, and before the final adjournment of the meeting. If a person owns shares of different classes or series that are entitled to vote in separate voting groups, the presence of the person at the meeting constitutes representation at the meeting of all the shares owned by that person.

4. VOTING REQUIREMENTS FOR APPROVAL BY VOTING GROUP. Section 725(3) provides that an action (other than the election of directors, which is governed by section 728) is approved by a voting group at a meeting at which a quorum is present if the votes cast in

favor of the action exceed the votes cast opposing the action. This section changes the traditional rule appearing in earlier versions of the Model Act and many state statutes that an action is approved at a meeting at which a quorum is present if it receives the affirmative vote "of a majority of the shares represented at that meeting." The traditional rule in effect treated abstentions as negative votes; the revised Model Act treats them truly as abstentions. The rule set forth in section 725(3) is considered desirable in part because it permits action to be taken by the shareholders when considered appropriate by a majority of those with views on the matter in question. Potential concern about the effect of abstentions in publicly held corporations has also been increased by changes in the SEC proxy regulations that permit shareholders of publicly held companies to abstain on issues.

The treatment of abstaining votes under the traditional rule gave rise to anomalous results in some situations. For example, if a corporation has 1,000 shares of a single class outstanding, all entitled to cast one vote each, a quorum consists of 501 shares; if 600 shares are represented and the vote on a proposed action is 280 in favor, 225 opposed, and 95 abstaining, the action is not approved since fewer than a majority of the 600 shares attending voted in favor of the action. This is anomalous since if the shares abstaining had not been present at the meeting at all a quorum would have been present and the action would have been approved. Under section 725(3) the action would not be defeated by the 95 abstaining votes.

In the absence of specific provision in the articles of incorporation, shares of classes or series that are entitled by statute to vote as a separate voting group are entitled to one vote per share. See section 721.

5. MODIFICATION OF STANDARD REQUIREMENTS. The articles of incorporation may modify the quorum and voting requirements of section 725 for a single voting group or for all voting groups entitled to vote on any matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity upon compliance with section 727; they may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a quorum is present. The articles may also decrease the quorum requirement as desired. Earlier versions of the Model Act limited the power to reduce the quorum to a minimum of one-third; this restriction was eliminated from the Revised Model Act because it was thought to be unreasonably confining in certain situations, such as where a class of shares with preferential rights is given a limited right to vote that may be exercisable only rarely.

Section 725(4) provides that section 727 governs the adoption or amendment of provisions in the articles of incorporation that impose greater quorum or voting requirements than provided for in this section.

6. SPECIAL APPROVAL REQUIREMENTS. The phrase "or this chapter" in sections 725(1) and (3) makes clear that wherever the provisions of the Model Act provide more stringent voting or quorum requirements, they control over section 725. More stringent requirements are provided for the approval of certain fundamental corporate changes--for example, certain amendments to the articles of incorporation, mergers, and the sale of all or substantially all the corporate property not in the ordinary course of business. See sections 1003, 1103, and 1202. See also section 831, which imposes a special voting and quorum requirement for approval of conflict of interest transactions by members of the board of directors.

IDAHO REPORTER'S COMMENT

New Model Act § 725 has been significantly revised from 1969 Model Act §32 [prior I.C. §30-1-32] to recognize the possibility of voting by groups, and it provides that separate voting and quorum requirements be established for each voting group.

New subsection (1) basically restates the basic definition of a quorum for a voting group in essentially the same terms as prior § 32's first sentence did for shareholders meetings, except that the not less than one third limit is eliminated. The articles may provide for lesser or greater quorum or voting requirements, provided that if greater requirements are established by amendment, new section 727, below, must be complied with.

New subsection (3) changes the basic voting requirement for approval from a majority of a quorum to more favorable than opposing votes.

New subsections (4) and (5) are entirely new. Their cross-references should be self-explanatory.

Directors' quorum and voting requirements are covered in new section 824, below.

30-1-726. Action by single and multiple voting groups. — (1) If the articles of incorporation or this chapter provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 30-1-725, Idaho Code.

(2) If the articles of incorporation or this chapter provide for voting by two (2) or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 30-1-725, Idaho Code. Action may be taken by one (1) voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

History.

I.C., § 30-1-726, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 726(1) provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in section 725. In most instances the single voting group will consist of all the shares of the class or classes entitled to vote by the articles of incorporation; voting by two or more voting groups as contemplated by section 726(b) is the exceptional case.

Section 726(2) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately. Implicit in this section are the concepts that (1) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (2) different quorum and voting requirements may be applicable to different voting groups voting on the same matter. See the Official Comment to section 725. Thus, each group entitled to vote must independently meet the quorum and voting requirements established by section 725. But if a quorum is present for one or more voting groups but not for all voting groups, section 726(2) provides that the voting groups for which a quorum is present may vote upon the matter.

A single meeting, furthermore, may consider matters on which action by several voting groups is required and also matters on which only a single voting group may act. Action may be taken on the matters on which the single voting group may act even though no quorum is present to take action on other matters. For example, in a corporation with one class of nonvoting shares with preferential rights ("preferred shares") and one class of general voting shares without preferential rights ("common shares"), a matter to be considered at the annual meeting may be a proposed amendment to the articles of incorporation that reduces the cumulative dividend right of the preferred shares (a matter on which the preferred shares have a statutory right to vote as a separate voting group). Other matters to be considered may include the election of directors and the appointment of an auditor, both matters on which the preferred shares have no vote. If a quorum of the voting group consisting of the common shares but no quorum of the voting group consisting of the preferred shares is present, the common shares may proceed to elect directors and appoint the auditor. The common shares voting group may also vote to approve the proposed amendment to the articles of the incorporation, but that amendment will not be approved until the preferred shares voting group also votes to approve the amendment.

1. VOTING REQUIREMENTS ON MULTIPLE VOTING GROUP MATTERS. In many multiple voting group situations under the Model Act, proposals are adopted only if a majority of all the votes entitled to be cast by each voting group approves the proposal. This percentage of votes is higher than that required by section 725, and is required, for example, under sections 1003(5)(a) and 1004(2) for all amendments to articles of incorporation that create dissenters' rights with respect to part or all of the shares of the voting group.

2. PARTICIPATION OF SHARES IN MULTIPLE VOTING GROUPS. As described in section 726(2), if voting by multiple voting groups is required, the votes of members of each voting group must be separately tabulated. Normally, each class or series of shares will participate in only a single voting group. But since holders of shares entitled by the articles of incorporation to vote generally on a matter are always entitled to vote in the voting group consisting of the general voting shares, in some instances classes or series of shares may be

entitled to be counted simultaneously in two voting groups. This will occur whenever a class or series of shares entitled to vote generally on a matter under the articles of incorporation is affected by the matter in a way that gives rise to the right to have its vote counted separately as an independent voting group under the Act. For example, assume that corporation Y has outstanding one class of general voting shares without preferential rights ("common shares"), 500 shares issued, and one class of shares with preferential rights ("preferred shares"), 100 shares issued, that also have full voting rights under the articles of incorporation, i.e., the preferred may vote for election of directors and on all other matters on which common may vote. The preferred and the common therefore are part of the general voting group. The directors propose to amend the articles of incorporation to change the preferential dividend rights of the preferred from cumulative to noncumulative. All shares are present at the meeting and they divide as follows on the proposal to adopt the amendment:

Yes:	Common	230
	Preferred	80
No:	Common	270
	Preferred	20

Both the preferred and the common are entitled to vote on the amendment to the articles of incorporation since they are part of a general voting group pursuant to the articles. But the vote of the preferred is also entitled to be counted separately on the proposal by section 1004(1)(d) of the Model Act. The result is that the proposal passes by a vote of 310 to 290 in the voting group consisting of the shares entitled to vote generally and 80 to 20 in the voting group consisting solely of the preferred shares:

(a) First voting group			
	Yes:	Common	230
		Preferred	80
			310
	No:	Common	270
		Preferred	20
			290
(b) Second voting group (preferred)			
	Yes:	Preferred	80
	No:	Preferred	20

In this situation, in the absence of a special quorum requirement, a meeting could approve the proposal to amend the articles of incorporation if--and only if--a quorum of each voting group is present, i.e., at least 51 shares of preferred and 301 shares of common and preferred were represented at the meeting.

IDAHO REPORTER'S COMMENT

Even though specific recognition of class voting has appeared in all earlier version of the new Model Act (including Idaho's 1979 revision), there has never been a previous attempt to define how quorum and voting requirements should be determined when separate classes actually vote on the same matter. The only related reference was in prior I.C. §30-1-32's last sentence, a reference of limited utility.

New § 726 provides a mechanism for separate "voting group" votes.

30-1-727. Greater quorum or voting requirements. — (1) The articles of incorporation may provide for a greater quorum or voting requirement for shareholders, or voting groups of shareholders, than is provided for by this chapter.

(2) An amendment to the articles of incorporation that adds, changes or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

History.

I.C., § 30-1-727, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 727(1) permits the articles of incorporation to increase the quorum or voting requirements for approval of an action by shareholders up to any desired amount including unanimity. These provisions may relate to ordinary or routine actions by the general voting group (which otherwise may be acted upon under section 725 if the number of affirmative votes exceeds the number of negative votes at a meeting at which a quorum of that voting group is present) or to one or more other voting groups or to actions for which the Model Act provides a greater voting requirement--for example, changes of a fundamental nature in the corporation like certain amendments to articles of incorporation (section 1003), mergers (section 1103), sales of all or substantially all the property of a corporation not in the ordinary course of business (section 1202), and dissolution (section 1402). Generally, the Model Act requires these fundamental changes to receive the affirmative vote of a majority of the votes entitled to be cast on the proposal by each voting group entitled to vote thereon rather than by a majority of the shares voting affirmatively or negatively at a meeting at which a quorum is present.

A provision that increases the requirement for approval of an ordinary matter or a fundamental change is usually referred to as a "supermajority" provision.

Section 727(2) requires any amendment of the articles of incorporation that adds, modifies, or repeals any supermajority provision to be approved by the greater of the proposed quorum and vote requirement or by the quorum and vote required by the articles before their amendment. Thus, a supermajority provision that requires an 80 percent affirmative vote of all eligible votes of a voting group present at the meeting may not be removed from the articles of incorporation or reduced in any way except by an 80 percent affirmative vote. If the 80 percent requirement is coupled with a quorum requirement for a voting group that shares representing two-thirds of the total votes must be present in person or by proxy, both the 80 percent voting requirement and the two-thirds quorum requirement are immune from reduction except at a meeting of the voting group at which the two-thirds quorum requirement is met and the reduction is approved by an 80 percent affirmative vote. If the proposal is to increase the 80 percent voting requirement to 90 percent, that proposal must be approved by a 90 percent affirmative vote at a meeting of the voting group at which the two-thirds quorum requirement is met; if the proposal is to increase the two-thirds quorum requirement to three-fourths without changing the 80 percent voting requirement, that proposal must be approved by an 80 percent affirmative vote at a meeting of the voting group at which a three-fourths quorum requirement is met.

IDAHO REPORTER'S COMMENT

New Model Act § 727, subsection (1) clarifies what was confused under prior I.C. §§30-1-32 and 143, namely whether supermajority provisions can be created in the bylaws as well as in the articles. They cannot.

New subsection (2) is entirely new, making any super-provisions subject to corporate adoption only upon compliance with the proposed new super-requirement itself.

30-1-728. Voting for directors — Cumulative voting. — (1) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(2) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(3) A statement included in the articles of incorporation that "[all][a designated voting group of shareholders] are entitled to cumulate their votes for directors," or words of similar import, means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two (2) or more candidates.

History.
I.C., § 30-1-728, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 728(1) provides that directors are elected by a plurality of the votes cast in an election of directors at a meeting at which a quorum is present of the voting group entitled to participate in the election. A "plurality" means that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election. In elections in which several factions are competing within a voting group, the individuals elected may have fewer than a majority of all the votes cast in the election. The articles of incorporation or bylaws of the corporation may, however, provide a different manner of election of directors.

The entire board of directors may be elected by a single voting group or the articles of incorporation may provide that different voting groups are entitled to elect a designated number or fraction of the board of directors. See section 804. Elections are contested only within specific voting groups.

Under section 728(2) each corporation may determine whether or not to elect its directors by cumulative voting. If directors are elected by different voting groups, the articles of incorporation may provide that specified voting groups are entitled to vote cumulatively while others are not. Cumulative voting affects the manner in which votes may be cast by shares participating in the election but does not affect the plurality principle set forth in section 728(1).

1. THE MANNER OF ELECTING CUMULATIVE VOTING. Section 728(2) provides basically for an "opt in" election. A corporation has cumulative voting with respect to a voting group only if an affirmative provision to that effect appears in its articles of incorporation.

2. THE MECHANICS OF CUMULATIVE VOTING. Section 728(3) describes the mechanics of cumulative voting: each shareholder may multiply the number of votes he is entitled to cast (based on the number of shares held by him) by the number of directors to be elected by the voting group at the meeting and may cast the product for a single candidate or distribute the product among two or more candidates. By casting all his votes for a single candidate or a limited number of candidates, a minority shareholder increases his voting power and may be able to elect one or more directors.

The proxy regulations of the Securities and Exchange Commission require proxy statements to include a statement that persons have the right to vote cumulatively, if that is the case, and briefly to describe that right.

IDAHO REPORTER'S COMMENT

New Model Act § 728, subsection (2) would switch Idaho from an "opt out" to an "opt in" jurisdiction with respect to cumulative voting, a decision also reflected in connection with section 202 on articles of incorporation.

New subsection (3) avoids any need for articles to describe the mechanics where the "opt in" option is exercised, being a restatement of the language in prior I.C. §30-1-33(d).

Idaho has deleted an Official Text subsection (4) which disqualifies shares otherwise entitled to be voted cumulatively from so voting under certain circumstances (notice requirements).

New subsection (1) for the first time in Model Act history actually addresses the question of the vote necessary to elect directors!

30-1-729. Inspectors of election. — (1) A corporation having any shares listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association shall, and any other corporation may, appoint one (1) or more inspectors to act at a meeting of shareholders and make a written report of the inspectors' determinations. Each inspector shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of the inspector's ability.

(2) The inspectors shall:

(a) Ascertain the number of shares outstanding and the voting power of each;
(b) Determine the shares represented at a meeting;
(c) Determine the validity of proxies and ballots;
(d) Count all votes; and
(e) Determine the result.
(3) An inspector may be an officer or employee of the corporation.

History.
I.C. § 30-1-729, as added by 2004, ch. 324, § 15, p. 907.

ABA OFFICIAL COMMENT

Section 729(1) requires that, if a corporation has shares which are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, one or more inspectors of election must be appointed to act at each meeting of shareholders and make a written report of the determinations made pursuant to section 729(2). It is contemplated that the selection of inspectors would be made by responsible officers or by the directors, as authorized either generally or specifically in the corporation's bylaws. Alternate inspectors could also be designated to replace any inspector who fails to act. The requirement of a written report is to facilitate judicial review of determinations made by inspectors.

Section 729(2) specifies the duties of inspectors of election. If no challenge of a determination by the inspectors within the authority given them under this section is timely made, such determination shall be conclusive. In the event of a challenge of any determination by the inspectors in a court of competent jurisdiction, the court should give such weight to determinations of fact by the inspectors as it shall deem appropriate, taking into account the relationship of the inspectors, if any, to the management of the company and other persons interested in the outcome of the vote, the evidence available to inspectors, whether their determinations appear to be reasonable, and such other circumstances as the court shall regard as relevant. The court should review de novo all determinations of law made implicitly or explicitly by the inspectors.

Normally, in making the determinations contemplated by section 729(2), the only facts before the inspectors should be appointment forms and electronic transmissions (or written evidence thereof), envelopes submitted with appointment forms, ballots and the regular books and records of the corporation, including lists of holders obtained from depositories. However, inspectors may consider other reliable information for the limited purpose of reconciling appointment forms, electronic transmissions, and ballots submitted by or on behalf of banks, brokers, their nominees, and similar persons which represent more votes than the holder of a proxy is authorized by the record owner to cast or more votes than the shareholder holds of record. If the inspectors do consider such other information, it should be specifically referred to in their written report, including the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained, and the basis for the inspectors' belief that such information is accurate and reliable.

Section 729(3) provides that an inspector may be an officer or employee of the corporation. However, in the case of publicly held corporations, good corporate practice suggests that such inspectors should be independent persons who are neither employees nor officers if there is a contested matter or a shareholder proposal to be considered. Not only will the issue of independent inspectors enhance investor perception as to the fairness of the voting process, but also the report of independent inspectors can be expected to be given greater evidentiary weight by any court reviewing a contested vote.

IDAHO REPORTER'S COMMENT

This section, added in 2004, provides for election inspectors for publicly-traded companies. It is consistent with federal and stock exchange governance of such corporations.

30-1-730. Voting trusts. — (1) One (1) or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise

act for them, by signing an agreement setting out the provisions of the trust, which may include anything consistent with its purpose, and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office.

(2) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. A voting trust is valid for not more than ten (10) years after its effective date unless extended under subsection (3) of this section.

(3) All or some of the parties to a voting trust may extend it for additional terms of not more than ten (10) years each by signing written consent to the extension. An extension is valid for ten (10) years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it.

History.

I.C., § 30-1-730, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A voting trust is a device by which one or more shareholders divorce the voting rights of their shares from the ownership, retaining the latter but transferring the former to one or more trustees in whom the voting rights of all the shareholders who are parties to the trust are pooled. Following the long established pattern of earlier versions of the Model Act and the statutes of many states, a voting trust under section 730(2) is valid for a maximum of 10 years after its effective date.

At common law, voting trusts were often viewed with hostility and were narrowly construed. They are, however, a reasonable voting device to accomplish legitimate objectives. As a result, much of the original judicial hostility to these arrangements has disappeared. See, e.g., *Oceanic Exploration Co. v. Grynberg*, 428 A.2d 1 (Del. 1981).

1. CREATION OF A VOTING TRUSTS. Section 730(1) provides a simple and direct procedure for the creation of an enforceable voting trust. The shareholders agree to participate in the trust and must sign the trust agreement, and the shares must be registered in the name of the trustee. Typically, the trust agreement provides that all attributes of beneficial ownership other than the power to vote are retained by the beneficial owners. In addition, the voting trustees may issue to the beneficial owners voting trust certificates which may be transferable in much the same way as shares.

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation's principal office, where both documents are available for inspection by shareholders under section 720. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create "secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of non-participating shareholders," *Lehrman v. Cohen*, 222 A.2d 800, 807 (Del. 1966).

The purpose of section 730 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10-year maximum should be treated as being valid for the maximum permissible term of 10 years.

2. EXTENSION OR RENEWAL OF VOTING TRUST. Section 730(3) permits a voting trust to be extended for successive terms of 10 years commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

IDAHO REPORTER'S COMMENT

New Model Act § 730 restates and elaborates on the most primary substance of prior I.C. §30-1-34 on voting trusts, but there are some differences. First, the provisions at the end of prior subsection (a) on inspection of voting trust documents are relocated to part 16 of the new Model Act. Second, the prior subsection (b) provisions on trustee voting, filling of trustee vacancies and trustee liability are not covered in the Model Act. Third, the new Model Act adds provisions on effective date and extensions, neither of which is addressed under prior §34.

A voting trust is simply a corporate control device and not a "trust" for purposes of banking and other regulatory laws. This new section 730 eliminates surplusage in prior §34 and is a more efficient statement of the basic rules.

30-1-731. Voting agreements. — (1) Two (2) or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 30-1-730, Idaho Code.

(2) A voting agreement created under this section is specifically enforceable.

History.

I.C., § 30-1-731, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 731(1) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as "pooling agreements." The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract. They are not subject to the 10-year limitation applicable to voting trusts.

Section 731(2) provides that voting agreements may be specifically enforceable. A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under section 722. If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. This section recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement, and also avoids the result reached in Ringling Bros. Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947) where the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party's shares.

IDAHO REPORTER'S COMMENT

New Model Act § 731(1) restates prior I.C. §30-1-34(c) without substantive change.

Subsection (2) is new in emphasis if not in substance. It is designed to avoid any problems of remedy created by some courts in enforcing these vote "pooling" agreements.

30-1-732. Shareholder agreements. — (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one (1) or more other provisions of this chapter in that it:

(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to limitations in section 30-1-640, Idaho Code;

(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(f) Transfers to one (1) or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(g) Requires dissolution of the corporation at the request of one (1) or more of the shareholders or upon the occurrence of a specified event or contingency; or

(h) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(2) An agreement authorized by this section shall be:

(a) Set forth:

(i) In the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement, or

(ii) In a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(b) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(c) Valid for ten (10) years, unless the agreement provides otherwise.

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by section 30-1-626(2), Idaho Code. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of

rescission authorized by this subsection must be commenced within the earlier of ninety (90) days after discovery of the existence of the agreement or two (2) years after the time of purchase of the shares.

(4) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(6) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(7) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

History.

I.C., § 30-1-732, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Shareholders of closely-held corporations, ranging from family businesses to joint ventures owned by large public corporations, frequently enter into agreements that govern the operation of the enterprise. In the past, various types of shareholder agreements were invalidated by courts for a variety of reasons, including so-called "sterilization" of the board of directors and failure to follow the statutory norms of the applicable corporation act. See, e.g., *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d 633 (1948). The more modern decisions reflect a greater willingness to uphold shareholder agreements; see, e.g., *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). In addition, many state corporation acts now contain provisions validating shareholder agreements. Heretofore, however, the Model Act has never expressly validated shareholder agreements.

Rather than relying on further uncertain and sporadic development of the law in the courts, section 732 rejects the older line of cases. It adds an important element of predictability currently absent from the Model Act and affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise.

Section 732 is not intended to establish or legitimize an alternative form of corporation. Instead, it is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements includes governance of the entity, allocation of the economic return from the business, and other aspects of the relationships among shareholders, directors, and the corporation which are part of the business arrangement. Section 732 also recognizes that many of the corporate norms contained in the Model Act, as well as the corporation statutes of most states, were designed with an eye towards public companies, where management and share

ownership are quite distinct. Cf. 1 O'Neal & Thompson, O'Neal's Close Corporations, section 5.06 (3d ed.). These functions are often conjoined in the close corporation. Thus, section 732 validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Act.

Importantly, section 732 only addresses the parties to the shareholder agreement, their transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third persons. Section 732 supplements the other provisions of the Model Act. If an agreement is not in conflict with another section of the Model Act, no resort need be made to section 732, with its requirement of unanimity. For example, special provisions can be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Act. Similarly, section 732 would not have to be relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a stock purchase agreement entered into in connection with the issuance of shares by a corporation.

The types of provisions validated by section 732 are many and varied. Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with section 732. Section 732(1) also contains a "catch all" which adds a measure of flexibility to the seven enumerated categories.

Omitted from the enumeration in section 732(1) is a provision found in the Close Corporation Supplement and in the statutes of many of the states, broadly validating any arrangement the effect of which is to treat the corporation as a partnership. This type of provision was considered to be too elastic and indefinite, as well as unnecessary in light of the more detailed enumeration of permissible subject areas contained in section 732(1). Note, however, that under section 732(6) the fact that an agreement authorized by section 732(1) or its performance treats the corporation as a partnership is not a ground for imposing personal liability on the parties if the agreement is otherwise authorized by subsection (1).

1. SECTION 732(1). Subsection (1) is the heart of section 732. It states that certain types of agreements are effective among the shareholders and the corporation even if inconsistent with another provision of the Model Act. Thus, an agreement authorized by section 732 is, by virtue of that section, "not inconsistent with law" within the meaning of sections 202(2)(b) and 206(2) of the Act. In contrast, a shareholder agreement that is not inconsistent with any provisions of the Model Act is not subject to the requirements of section 732.

The range of agreements validated by section 732(1) is expansive though not unlimited. The most difficult problem encountered in crafting a shareholder agreement validation provision is to determine the reach of the provision. Some states have tried to articulate the limits of a shareholder agreement validation provision in terms of negative grounds, stating that no shareholder agreement shall be invalid on certain specified grounds. See, e.g., Del. Code Ann. tit. 8, sections 350, 354 (1983); N.C. Gen. Stat. section 55-73(b) (1982). The deficiency in this type of statute is the uncertainty introduced by the ever present possibility of articulating another ground on which to challenge the validity of the agreement. Other states have provided that shareholder agreements may waive or alter all provisions in the corporation act except certain enumerated provisions that cannot be varied. See, e.g., Cal. Corp. Code section 300(b)-(c) (West 1989 and Supp. 1990). The difficulty with this approach is that any enumeration of the provisions that can never be varied will almost inevitably be subjective, arbitrary, and incomplete.

The approach chosen in section 732 is more pragmatic. It defines the types of agreements that can be validated largely by illustration. The seven specific categories that are listed are designed to cover the most frequently used arrangements. The outer boundary is provided by section 732(1)(h), which provides an additional "catch all" for any provisions that, in a manner inconsistent with any other provision of the Model Act, otherwise govern the exercise of the corporate powers, the management of the business and affairs of the corporation, or the relationship between and among the shareholders, the directors, and the corporation or any of them. Section 732(1) validates virtually all types of shareholder agreements that, in practice, normally concern shareholders and their advisors.

Given the breadth of section 732(1), any provision that may be contained in the articles of incorporation with a majority vote under sections 202(2)(b)(ii) and (iii), as well as under section 202(2)(d), may also be effective if contained in a shareholder agreement that complies with section 732.

The provisions of a shareholder agreement authorized by section 732(1) will often, in operation, conflict with the literal language of more than one section of the Act, and courts

should in such cases construe all related sections of the Act flexibly and in a manner consistent with the underlying intent of the shareholder agreement. Thus, for example, in the case of an agreement that provides for weighted voting by directors, every reference in the Act to a majority or other proportion of directors should be construed to refer to a majority or other proportion of the votes of the directors.

While the outer limits of the catch-all provision of subsection 732(1)(h) are left uncertain, there are provisions of the Model Act that cannot be overridden by resort to the catch-all. Subsection (1)(h), introduced by the term "otherwise," is intended to be read in context with the preceding seven subsections and to be subject to an *ejusdem generis* rule of construction. Thus, in defining the outer limits, courts should consider whether the variation from the Model Act under consideration is similar to the variations permitted by the first seven subsections. Subsection (1)(h) is also subject to a public policy limitation, intended to give courts express authority to restrict the scope of the catch-all where there are substantial issues of public policy at stake. For example, a shareholder agreement that provides that the directors of the corporation have no duties of care or loyalty to the corporation or the shareholders would not be within the purview of section 732(1)(h), because it is not sufficiently similar to the types of arrangements suggested by the first seven subsections of section 732(1) and because such a provision could be viewed as contrary to a public policy of substantial importance. Similarly, a provision that exculpates directors from liability more broadly than permitted by section 202(2)(d) likely would not be validated under section 732, because, as the Official Comment to section 202(2)(d) states, there are serious public policy reasons which support the few limitations that remain on the right to exculpate directors from liability. Further development of the outer limits is left, however, for the courts.

As noted above, shareholder agreements otherwise validated by section 732 are not legally binding on the state, on creditors, or on other third parties. For example, an agreement that dispenses with the need to make corporate filings required by the Act would be ineffective. Similarly, an agreement among shareholders that provides that only the president has authority to enter into contracts for the corporation would not, without more, be binding against third parties, and ordinary principles of agency, including the concept of apparent authority, would continue to apply.

2. SECTION 732(2). Section 732 minimizes the formal requirements for a shareholder agreement so as not to restrict unduly the shareholders' ability to take advantage of the flexibility the section provides. Thus, unlike comparable provisions in special close corporation legislation, it is not necessary to "opt in" to a special class of close corporations in order to obtain the benefits of section 732. An agreement can be validated under section 732 whether it is set forth in the articles of incorporation, the bylaws or in a separate agreement, and whether or not section 732 is specifically referenced in the agreement. The principal requirements are simply that the agreement be in writing and be approved or agreed to by all persons who are then shareholders. Where the corporation has a single shareholder, the requirement of an "agreement among the shareholders" is satisfied by the unilateral action of the shareholder in establishing the terms of the agreement, evidenced by provisions in the articles or bylaws, or in a writing signed by the sole shareholder. Although a writing signed by all the shareholders is not required where the agreement is contained in articles of incorporation or bylaws unanimously approved, it may be desirable to have all the shareholders actually sign the instrument in order to establish unequivocally their agreement. Similarly, while transferees are bound by a valid shareholder agreement, it may be desirable to obtain the affirmative written assent of the transferee at the time of the transfer. Subsection (2) also establishes and permits amendments by less than unanimous agreement if the shareholder agreement so provides.

Section 732(2) requires unanimous shareholder approval regardless of entitlement to vote. Unanimity is required because an agreement authorized by section 732 can effect material organic changes in the corporation's operation and structure, and in the rights and obligations of shareholders.

The requirement that the shareholder agreement be made known to the corporation is the predicate for the requirement in subsection (3) that share certificates or information statements be legended to note the existence of the agreement. No specific form of notification is required and the agreement need not be filed with the corporation. In the case of shareholder agreements in the articles or bylaws, the corporation will necessarily have notice. In the case of shareholder agreements outside the articles or bylaws, the requirement of signatures by all of the shareholders will in virtually all cases be sufficient to constitute notification to the corporation, as one or more signatories will normally also be a director or an officer.

3. SECTION 732(3). Section 732(3) addresses the effect of a shareholder agreement on subsequent purchasers or transferees of shares. Typically, corporations with shareholder agreements also have restrictions on the transferability of the shares as authorized by section

627 of the Model Act, thus lessening the practical effects of the problem in the context of voluntary transferees. Transferees of shares without knowledge of the agreement or those acquiring shares upon the death of an original participant in a close corporation may, however, be heavily impacted. Weighing the burdens on transferees against the burdens on the remaining shareholders in the enterprise, section 732(3) affirms the continued validity of the shareholder agreement on all transferees, whether by purchase, gift, operation of law, or otherwise. Unlike restrictions on transfer, it may be impossible to enforce a shareholder agreement against less than all of the shareholders. Thus, under section 732, one who inherits shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be exercised at the initiation of the shareholder agreement to ensure a different outcome, such as providing for a buy-back upon death.

Where shares are transferred to a purchaser without knowledge of a shareholder agreement, the validity of the agreement is similarly unaffected, but the purchaser is afforded a rescission remedy against the seller. The term "purchaser" imports consideration. Under subsection (3) the time at which notice to a purchaser is relevant for purposes of determining entitlement to rescission is the time when a purchaser acquires the shares rather than when a commitment is made to acquire the shares. If the purchaser learns of the agreement after he is committed to purchase but before he acquires the shares, he should not be permitted to proceed with the purchase and still obtain the benefit of the remedies in section 732(3). Moreover, under contract principles and the securities laws a failure to disclose the existence of a shareholder agreement would in most cases constitute the omission of a material fact and may excuse performance of the commitment to purchase. The term purchaser includes a person acquiring shares upon initial issue or by transfer, and also includes a pledgee, for whom the time of purchase is the time the shares are pledged.

Section 732 addresses the underlying rights that accrue to shares and shareholders and the validity of shareholder action which redefines those rights, as contrasted with questions regarding entitlement to ownership of the security, competing ownership claims, and disclosure issues. Consistent with this dichotomy, the rights and remedies available to purchasers under section 732(3) are independent of those provided by contract law, article 8 of the Uniform Commercial Code, the securities laws, and other law outside the Model Act. With respect to the related subject of restrictions on transferability of shares, note that section 732 does not directly address or validate such restrictions, which are governed instead by section 627 of the Act. However, if such restrictions are adopted as a part of a shareholder agreement that complies with the requirements of section 732, a court should construe broadly the concept of reasonableness under section 627 in determining the validity of such restrictions.

Section 732(3) contains an affirmative requirement that the share certificate or information statement for the shares be legended to note the existence of a shareholder agreement. No specified form of legend is required, and a simple statement that "[t]he shares represented by this certificate are subject to a shareholder agreement" is sufficient. At that point a purchaser must obtain a copy of the shareholder agreement from his transferor or proceed at his peril. In the event a corporation fails to legend share certificates or information statements, a court may, in an appropriate case, imply a cause of action against the corporation in favor of an injured purchaser without knowledge of a shareholder agreement. The circumstances under which such a remedy would be implied, the proper measure of damages, and other attributes of and limitations on such an implied remedy are left to development in the courts.

If the purchaser has no actual knowledge of a shareholder agreement, and is not charged with knowledge by virtue of a legend on the certificate or information statement, he has a rescission remedy against his transferor (which would be the corporation in the case of a new issue of shares). While the statutory rescission remedy provided in subsection (3) is nonexclusive, it is intended to be a purchaser's primary remedy.

If the shares are certificated and duly legended, a purchaser is charged with notice of the shareholder agreement even if the purchaser never saw the certificate. Thus, a purchaser is exposed to risk if he does not ask to see the certificate at or prior to the purchase of the shares. In the case of uncertificated shares, however, the purchaser is not charged with notice of the shareholder agreement unless a duly-legended information statement is delivered to the purchaser at or prior to the time of purchase. This different rule for uncertificated shares is intended to provide an additional safeguard to protect innocent purchasers, and is necessary because section 626(2) of the Act and section 8-408 of the U.C.C. permit delivery of information statements after a transfer of shares.

4. SECTION 732(4). Section 732(4) contains a self-executing termination provision for a shareholder agreement when the shares of the corporation become publicly held. The statutory norms in the Model Act become more necessary and appropriate as the number of shareholders increases, as there is greater opportunity to acquire or dispose of an investment in the corporation, and as there is less opportunity for negotiation over the terms under which the

enterprise will be conducted. Given that section 732 requires unanimity, however, in most cases a practical limit on the availability of a shareholder agreement will be reached before a public market develops. Subsection (4), coupled with a parallel change in section 801, rejects the use of an absolute number of shareholders in determining when the shelter of section 732 is lost.

5. MISCELLANEOUS PROVISIONS. Sections 732(5) through (7) contain a number of technical provisions. Subsection (5) provides a shift of liability from the directors to any person or persons in whom the discretion or powers otherwise exercised by the board of directors are vested. A shareholder agreement which provides for such a shift of responsibility, with the concomitant shift of liability provided by subsection (5), could also provide for exculpation from that liability to the extent otherwise authorized by the Act. The transfer of liability provided by subsection (5) covers liabilities imposed on directors "by law," which is intended to include liabilities arising under the Act, the common law, and statutory law outside the Act. Nevertheless, there could be cases where subsection (5) is ineffective and where a director is exposed to liability quo director, even though under a shareholder agreement he may have given up some or all of the powers normally exercised by directors.

Subsection (6), based on the Close Corporation Supplement and the Texas statute, narrows the grounds for imposing personal liability on shareholders for the liabilities of a corporation for acts or omissions authorized by a shareholder agreement validated by section 732. Subsection (7) addresses shareholder agreements for corporations that are in the process of being organized and do not yet have shareholders.

The Model Act does not, of course, address the tax status of a corporation formed under the Act. When an unorthodox arrangement is established pursuant to a shareholder agreement authorized by section 732, the corporation could in some circumstances be deemed a partnership for tax purposes, an issue to which counsel should be attuned, but which is not addressed in the Model Act. See Treas. Reg. section 301.7701-1 (as amended in 1977); Rev. Rul. 88-76, 1988-2 C.B. 360 (company organized pursuant to a Wyoming statute for "limited liability companies" classified for federal tax purposes as a partnership).

IDAHO REPORTER'S COMMENT

New Model Act § 732 is entirely new to Idaho. Only eight other states appear to have comparable provisions expressly validating these classic close corporation devices in the general corporation act, even devices otherwise inconsistent with other provisions of the Act itself. Among the eight other states are Utah and Washington. Utah's provision is substantially identical to section 732. Washington's version differs, however, in two respects:

(1) Washington requires that the shareholder agreement be a writing signed by all the shareholders.

(2) Washington allows aggrieved purchasers without even constructive knowledge of the agreement to either (i) bring an action or (ii) join the agreement with any action limited to damages from nondisclosure.

Idaho has opted for the "Utah version." This affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise.

30-1-733 — 30-1-739. [Reserved.]

30-1-740. Definitions. — As used in sections 30-1-741 through 30-1-747, Idaho Code, "derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in section 30-1-747, Idaho Code, in the right of a foreign corporation.

History.

I.C., § 30-1-740, as added by 1998, ch. 223, § 2, p. 766.

STATUTORY NOTES

Prior Laws.

Former § 30-1-740, which comprised I.C., § 30-1-740, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 1998, ch. 223, § 1.

ABA OFFICIAL COMMENT

DERIVATIVE PROCEEDINGS.

INTRODUCTORY ABA OFFICIAL COMMENT

Sections 30-1-740 through 30-1-747 deal with the requirements applicable to shareholders derivative suits. A great deal of controversy has surrounded the derivative suit, and widely different perceptions as to the value and efficacy of this litigation continue to exist. On the one hand, the derivative suit has historically been the principal method of challenging allegedly illegal action by management. On the other hand, it has long been recognized that the derivative suit may be instituted more with a view to obtaining a settlement resulting in fees to the plaintiff's attorney than to righting a wrong to the corporation (the so-called "strike suit").

Sections 30-1-740 through 30-1-747 replace section 740 of the Revised Model Business Corporation Act (pre-1998 I.C. § 30-1-740) which at the time of its adoption was stated to reflect a reappraisal of the various procedural devices designed to control abuses of the derivative suit "in light of major developments in corporate governance, the public demand for corporate accountability, and the corporate response in the form of greater independence and sense of responsibility in boards of directors."

Sections 30-1-740 through 30-1-747 reflect a further reappraisal of the requirements for a derivative suit particularly in the light of the large number of judicial decisions dealing with (a) whether demand upon the board of directors is required and (b) the power of independent directors to dismiss a derivative suit. The first of these issues was dealt with indirectly in former section 740 by requiring that the complaint state whether demand was made and, if not, why not; the second issue was not covered at all.

Section 742 requires a demand on the corporation in all cases. The demand must be made at least 90 days before commencement of suit unless irreparable injury to the corporation would result. It is believed that this provision will eliminate the often excessive time and expense for both litigants and the court in litigating the question whether demand is required but at the same time will not unduly restrict the legitimate derivative suit.

Section 744 expressly requires the dismissal of a derivative suit if independent directors have determined that the maintenance of the suit is not in the best interests of the corporation. This section confirms the basic principle that a derivative suit is an action on behalf of the corporation and therefore should be controlled by those directors who can exercise an independent business judgment with respect to its continuance. At the same time, the court is required to assess the independence and good faith of the directors and the reasonableness of their inquiry and, if a majority of the board is not independent, the burden is placed on the corporation to prove each of these elements.

Section 744 also provides a procedure for the determination to be made by a panel appointed by the court.

The definition of "derivative proceeding" makes it clear that the subchapter applies to foreign corporations only to the extent provided in section 747. Section 747 provides that the law of the jurisdiction of incorporation governs except for sections 743 (stay of proceedings), 745 (discontinuance or settlement) and 746 (payment of expenses). See the Official Comment to section 747.

The definition of "shareholder," which applies only to sections 30-1-740 through 30-1-747, includes all beneficial owners and therefore goes beyond the definition in section 140(22) which includes only record holders and beneficial owners who are certified by a nominee pursuant to the procedure specified in section 723. Similar definitions are found in section 1301 (appraisal rights) and section 1602(6) (inspection of records by a shareholder). In the context of sections 30-1-740 through 30-1-747, beneficial owner means a person having a direct economic interest in the shares. The definition is not intended to adopt the broad definition of beneficial ownership in SEC Rule 13d-2 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-2, which includes persons with the right to vote or dispose of the shares even though they have no economic interest in them.

30-1-741. Standing. — A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one (1) who was a shareholder at that time; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

History.
I.C., § 30-1-741, as added by 1998, ch. 223, § 3, p. 766.

JUDICIAL DECISIONS

Lack of Standing.
Creditor, who sued his debtors' attorneys, could not amend pursuant to Idaho R. Civ. P. 15(a) to assert derivative claims because he was not a shareholder of the debtor entities and, thus, lacked standing. Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010).

ABA OFFICIAL COMMENT

The Model Act and the statutes of many states have long imposed a "contemporaneous ownership" rule, i.e., the plaintiff must have been an owner of shares at the time of the transaction in question. This rule has been criticized as being unduly narrow and technical and unnecessary to prevent the transfer or purchase of lawsuits. A few states, particularly California, Cal. Corp. Code section 800(B) (West 1977 & Supp. 1989), have relaxed this rule in order to grant standing to some subsequent purchasers of shares in limiting circumstances.

The decision to retain the contemporaneous ownership rule in section 741(1) was based primarily on the view that it was simple, clear, and easy to apply. In contrast, the California approach might encourage the acquisition of shares in order to bring a lawsuit, resulting in litigation on peripheral issues such as the extent of the plaintiff's knowledge of the transaction in question when the plaintiff acquired the shares. Further, there has been no persuasive showing that the contemporaneous ownership rule has prevented the litigation of substantial suits, at least with respect to publicly held corporations where there are many persons who might qualify as plaintiffs to bring suit even if subsequent purchasers are disqualified.

Section 741 requires the plaintiff to be a shareholder and therefore does not permit creditors or holders of options, warrants, or conversion rights to commence a derivative proceeding.

Section 741(2) follows the requirement of Federal Rule of Civil Procedure 23.1 with the exception that the plaintiff must fairly and adequately represent the interests of the corporation rather than shareholders similarly situated as provided in the rule. The clarity of the rule's language in this regard has been questioned by the courts. See *Nolen v. Shaw-Walker Company*, 449 F.2d 506, 508 n.4 (6th Cir. 1972). Furthermore, it is believed that the reference to the corporation in section 741(2) more properly reflects the nature of the derivative suit.

The introductory language of section 741 refers both to the commencement and maintenance of the proceeding to make it clear that the proceeding should be dismissed if, after commencement, the plaintiff ceases to be a shareholder or a fair and adequate representative. The latter would occur, for example, if the plaintiff were using the proceeding for personal advantage. If a plaintiff no longer has standing, courts have in a number of instances provided an opportunity for one or more other shareholders to intervene.

30-1-742. Demand. — No shareholder may commence a derivative proceeding until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) Ninety (90) days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

History.
I.C., § 30-1-742, as added by 1998, ch. 223, § 4, p. 766.

JUDICIAL DECISIONS

Analysis

Applicability.

Where the actions of a corporation and its directors have an effect on an individual shareholder above and beyond the effect of every other shareholder and there is evidence that that shareholder may have been the target of a squeeze-out, an action by that shareholder may be an individual, not derivative, proceeding and not be governed by the notice requirement of this section. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

Form of Demand.

Merely sending of a letter to the president of the corporation or the service upon the corporation's attorney of a demand that the corporation take legal action in connection with a transaction complained of did not meet the demand requirement of this section to maintain a shareholder derivative action. McCann v. McCann, 138 Idaho 228, 61 P.3d 585 (2002).

Demand on the directors under this section need not assume a particular form nor include any special language; however, the stockholder had to make a sincere effort to induce the directors to take remedial action in the corporate name, and statements should have been presented to the directors showing the wrong complained of, accompanied by sufficient responsible data which would enable the directors to determine whether litigation could be engaged in with some hope of success. McCann v. McCann, 138 Idaho 228, 61 P.3d 585 (2002).

Cited in: Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

ABA OFFICIAL COMMENT

Section 742 requires a written demand on the corporation in all cases. The demand must be made at least 90 days before commencement of suit unless irreparable injury to the corporation would result. This approach has been adopted for two reasons. First, even though no director may be independent, the demand will give the board of directors the opportunity to re-examine the act complained of in the light of a potential lawsuit and take corrective action. Secondly, the provision eliminates the time and expense of the litigants and the court involved in litigating the question whether demand is required. It is believed that requiring a demand in all cases does not impose an onerous burden since a relatively short waiting period of 90 days is provided and this period may be shortened if irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. Moreover, the cases in which demand is excused are relatively rare. Many plaintiffs' counsel as a matter of practice make a demand in all cases rather than litigate the issue whether demand is excused.

1. FORM OF DEMAND. Section 742 specifies only that the demand shall be in writing. The demand should, however, set forth the facts concerning share ownership and be sufficiently specific to apprise the corporation of the action sought to be taken and the grounds for that action so that the demand can be evaluated. See *Allison v. General Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del. 1985). Detailed pleading is not required since the corporation can contact the shareholder for clarification if there are any questions. In keeping with the spirit of this section, the specificity of the demand should not become a new source of dilatory motions.

2. UPON WHOM DEMAND SHOULD BE MADE. Section 742 states that demand shall be made upon the corporation. Reference is not made specifically to the board of directors as in pre-1998 section 740(2) since there may be instances such as a decision to sue a third party for an injury to the corporation, in which the taking of, or refusal to take, action would fall within the authority of an officer of the corporation. Nevertheless, it is expected that in most cases the board of directors will be the appropriate body to review the demand. To ensure that the demand reaches the appropriate person for review, it should be addressed to the board of directors, chief executive officer, or corporate secretary of the corporation at its principal office.

3. THE 90-DAY PERIOD. Section 742(2) provides that the derivative proceeding may not be commenced until 90 days after demand has been made. Ninety days has been chosen as a reasonable minimum time within which the board of directors can meet, direct the necessary inquiry into the charges, receive the results of the inquiry and make its decision. In many instances a longer period may be required. See, e.g., *Mozes v. Welch*, 638 F. Supp. 215 (D. Conn. 1986) (eight month delay in responding to demand not unreasonable). However, a fixed time period eliminates further litigation over what is or is not a reasonable time. The corporation may request counsel for the shareholder to delay filing suit until the inquiry is completed or, if suit is commenced, the corporation can apply to the court for a stay under section 743.

Two exceptions are provided to the 90-day waiting period. The first exception is the situation where the shareholder has been notified of the rejection of the demand prior to the end of the 90 days. The second exception is where irreparable injury to the corporation would otherwise result if the commencement of the proceeding is delayed for the 90-day period. The standard to be applied is intended to be the same as that governing the entry of a preliminary injunction. Compare *Gimbel v. Signal Cos.*, 316 A.2d 599 (Del. Ch. 1974) with *Gelco Corp. v. Coniston Partners*, 811 F.2d 414 (8th Cir. 1987). Other factors may also be considered, such as the possible expiration of the statute of limitations, although this would depend on the period of time during which the shareholder was aware of the grounds for the proceeding. It should be noted that the shareholder bringing suit does not necessarily have to be the person making the demand. Only one demand need be made in order for the corporation to consider whether to take corrective action.

4. RESPONSE BY THE CORPORATION. There is no obligation on the part of the corporation to respond to the demand. However, if the corporation, after receiving the demand, decides to institute litigation or, after a derivative proceeding has commenced, decides to assume control of the litigation, the shareholder's right to commence or control the proceeding ends unless it can be shown that the corporation will not adequately pursue the matter. As stated in *Lewis v. Graves*, 701 F.2d 245, 247-48 (2d Cir. 1983):

> The [demand] rule is intended "to give the derivative corporation itself the opportunity to take over a suit which was brought on its behalf in the first place, and thus to allow the directors the chance to occupy their normal status as conductors of the corporation's affairs." Permitting corporations to assume control over shareholder derivative suits also has numerous practical advantages. Corporate management may be in a better position to pursue alternative remedies, resolving grievances without burdensome and expensive litigation. Deference to directors' judgments may also result in the termination of meritless actions brought solely for their settlement or harassment value. Moreover, where litigation is appropriate, the derivative corporation will often be in a better position to bring or assume the suit because of superior financial resources and knowledge of the challenged transactions. [Citations omitted.]

30-1-743. Stay of proceedings. — If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for such period as the court deems appropriate.

History.
I.C., § 30-1-743, as added by 1998, ch. 223, § 5, p. 766.

ABA OFFICIAL COMMENT

Section 743 provides that if the corporation undertakes an inquiry, the court may in its discretion stay the proceeding for such period as the court deems appropriate. This might occur where the complaint is filed 90 days after demand but the inquiry into matters raised by the demand has not been completed or where a demand has not been investigated but the corporation commences the inquiry after the complaint has been filed. In either case, it is expected that the court will monitor the course of the inquiry to ensure that it is proceeding expeditiously and in good faith.

30-1-744. Dismissal. — (1) A derivative proceeding shall be dismissed by the court on motion by the corporation if one (1) of the groups specified in subsection (2) or (6) of this section has determined in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation.

(2) Unless a panel is appointed pursuant to subsection (6) of this section, the determination in subsection (1) of this section shall be made by:

(a) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum;

(b) A majority vote of a committee consisting of two (2) or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constituted a quorum.

(3) None of the following shall by itself cause a director to be considered not independent for purposes of this section:

(a) The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;

(b) The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

(c) The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

(4) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing either (a) that a majority of the board of directors did not consist of independent directors at the time the determination was made, or (b) that the requirements of subsection (1) of this section have not been met.

(5) If a majority of the board of directors does not consist of independent directors at the time the determination is made, the corporation shall have the burden of proving that the requirements of subsection (1) of this section have been met. If a majority of the board of directors consists of independent directors at the time the determination is made, the plaintiff shall have the burden of proving that the requirements of subsection (1) have not been met.

(6) The court may appoint a panel of one (1) or more independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation. In such case, the plaintiff shall have the burden of proving that the requirements of subsection (1) of this section have not been met.

History.

I.C., § 30-1-744, as added by 1998, ch. 223, § 6, p. 766.

ABA OFFICIAL COMMENT

The prior version of the Model Act did not expressly provide what happens when a board of directors properly rejects a demand to bring an action. Judicial decisions indicate that a derivative action should be dismissed in these circumstances. See *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984). The prior version of the Model Act was also silent on the effect of a determination by a special litigation committee of independent directors that a previously commenced derivative action can be dismissed. Several state corporation laws have been amended to provide for action by such a committee. Ind. Code Ann. § 23-1-32-4 (Burns 1984 & Supp. 1988); N.D. Cent. Code § 10-19.1-49 (1985). Section 744(1) specifically provides that the proceeding shall be dismissed if there is a proper determination that the maintenance of the proceeding is not in the best interests of the corporation. This determination can be made prior to commencement of the suit in response to a demand or after commencement upon examination of the allegations of the complaint.

The procedures set forth in section 744 are not intended to be exclusive. As noted in the comment to section 742, there may be instances where a decision to commence an action falls within the authority of an officer of the corporation depending upon the amount of the claim and the identity of the potential defendants.

1. THE PERSONS MAKING THE DETERMINATION. Section 744(2) prescribes the persons by whom the determination in subsection (1) may be made. The subsection provides that the determination may be made by a majority vote of independent directors if there is a quorum of independent directors, or by a committee of independent directors appointed by a vote of the independent directors. These provisions parallel the mechanics for determining entitlement to indemnification in section 855. In this respect this clause is an exception to section 825 which requires the approval of at least a majority of all the directors in office to create a committee and appoint members. This approach has been taken to respond to the criticism expressed in a few cases that special litigation committees suffer from a structural bias because of their appointment by vote of non-independent directors. See *Hasan v. Cleve Trust Realty Investors*, 729 F.2d 372, 376-77 (6th Cir. 1984).

The decisions which have examined the qualifications of directors making the determination have required that they be both "disinterested" in the sense of not having a personal interest in the transaction being challenged as opposed to a benefit which devolves upon the corporation or all shareholders generally, and "independent" in the sense of not being influenced in favor of the defendants by reason of personal or other relationships. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812-16 (Del. 1984). Only the word "independent" has been used in section 744(2) because it is believed that this word necessarily also includes the requirement that a person have no interest in the transaction. The concept of an independent director is not intended to be limited to non-officer or "outside" directors but may in appropriate circumstances include directors who are also officers.

Many of the special litigation committees involved in the reported cases consisted of directors who were elected after the alleged wrongful acts by the directors who were named as defendants in the action. Subsection (3)(a) makes it clear that the participation of non-independent directors or shareholders in the nomination or election of a new director shall not prevent the new director from being considered independent. This sentence therefore rejects the concept that the mere appointment of new directors by the non-independent directors makes the new directors not independent in making the necessary determination because of an inherent structural bias. Clauses (b) and (c) also confirm the decisions by a number of courts that the mere fact that a director has been named as a defendant or approved the action being challenged does not cause the director to be considered not independent. See *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984); *Lewis v. Graves*, 701 F.2d 245 (2d Cir. 1983). It is believed that a court will be able to assess any actual bias in deciding whether the director is independent without any presumption arising out of the method of the director's appointment, the mere naming of the director as a defendant, or the director's approval of the act where the director received no personal benefit from the transaction.

Subsection (6) also provides for a determination by a panel of one or more independent persons appointed by the court. Cf. Virginia Stock Corp. Act § 13.1-672D (1987) (court may appoint a committee of two or more persons). The subsection provides for the appointment only upon motion by the corporation. This would not, however, prevent the court on its own initiative from appointing a special master pursuant to applicable state rules of procedure.

This procedure may be desirable in a number of circumstances. If there are no independent directors available, the corporation may not wish to enlarge the board to add independent directors or may be unable to find persons willing to serve as independent directors. In addition, if there are independent directors, they may not have the available time to conduct the inquiry in an expeditious manner.

Appointment by the court should also eliminate any question about the independence of the person making the determination. Although the corporation may wish to suggest to the court possible appointees, the court will not be bound by these suggestions and, in any case, will want to satisfy itself with respect to independence at the time the person is appointed. When the court appoints a panel, section 744(6) places the burden on the plaintiff to prove that the requirements of section 744(1) have not been met.

Although subsection (2)(b) requires a committee of at least two directors, subsection (6) permits the appointment of only one person in recognition of the potentially increased costs to the corporation for the fees and expenses of an outside person.

2. STANDARD TO BE APPLIED. Section 744(1) requires that the determination be made by the appropriate persons in good faith after conducting a reasonable inquiry upon which their conclusions are based. The word "inquiry" rather than "investigation" has been used to make it clear that the scope of the inquiry will depend upon the issues raised and the knowledge of the group making the determination with respect to the issues. In some cases, the issues may be so simple or the knowledge of the group so extensive that little additional inquiry is required. In other cases, the group may need to engage counsel and other professionals to make an investigation and assist the group in its evaluation of the issues.

The phrase "in good faith" modifies both the determination and the inquiry. The test, which is also included in sections 830 (general standards of conduct for directors) and 851 (authority to indemnify), is a subjective one, meaning "honestly or in an honest manner." "The Corporate Director's Guidebook," 33 Bus. Law. 1595, 1601 (1978). As stated in *Abella v. Universal Leaf Tobacco Co.*, 546 F. Supp. 795, 800 (E.D. Va. 1982), "the inquiry intended by this phrase goes to the spirit and sincerity with which the investigation was conducted, rather than the reasonableness of its procedures or basis for conclusions."

The phrase "upon which its conclusions are based" requires that the inquiry and the conclusions follow logically. This provision authorizes the court to examine the determination to ensure that it has some support in the findings of the inquiry. The burden of convincing the court about this issue lies with whichever party has the burden under section 744(5). This phrase does not require the persons making the determination to prepare a written report that sets forth their determination and the bases therefor, since circumstances will vary as to the need for such a report. There may, however, be many instances where good corporate practice will commend such a procedure.

Section 744 is not intended to modify the general standards of conduct for directors set forth in section 830, but rather to make those standards somewhat more explicit in the derivative proceeding context. In this regard, the independent directors making the determination would be entitled to rely on information and reports from other persons in accordance with section 830(2).

Section 744 is similar in several respects and differs in certain other respects from the law as it has developed in Delaware and been followed in a number of other states. Under the Delaware cases, the role of the court in reviewing the board's determination varies depending upon whether the plaintiff is in a demand-required or demand-excused situation. Demand is excused only if the plaintiff pleads particularized facts that create a reasonable doubt that a majority of directors at the time demand would be made are independent or disinterested, or that the challenged transaction was the product of a valid exercise of business judgment by the approving board. *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *Levine v. Smith*, 591 A.2d 194 (Del. 1991). If the plaintiff fails to make these two showings, demand is required. Since the Aronson requirements are difficult to satisfy, the plaintiff normally must make demand on the board.

In the unusual case where the plaintiff's demand is excused under either of the Aronson tests, the plaintiff has standing to bring the derivative suit. If the corporation seeks to reassert its right to control the litigation, the corporation will form a special litigation committee to determine if the litigation is in the best interests of the corporation. If the corporation files a motion to dismiss the litigation based upon the recommendation of the special committee, Delaware law requires the corporation to bear the burden of proving the independence of the committee, the reasonableness of its investigation, and the reasonableness of the bases of its decision reflected in the motion. *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981). Zapata also permits the court a discretionary second step to review the special committee's decision by invoking the court's "independent business judgment." *Id.* at 789.

In the usual scenario where demand is not excused, the shareholder must demand that the board take action and the Zapata principles do not apply. The board or special committee of independent directors decides whether the corporation should take the action the shareholder requests or respond in some other way. As in the case of all board decisions, the board's response to the shareholder's demand is presumptively protected by the traditional business judgment rule. *Allison v. General Motors Corp.*, 604 F. Supp. 1106, 1122 (D. Del. 1985). As a result, the shareholder in filing suit bears the normal burden of creating by particularized pleadings a reasonable doubt that the board's response to the demand was wrongful. *Levine v. Smith*, No. 591 A.2d 194, 210 (Del. 1991). The plaintiff must allege with particularity a lack of good faith, care, independence, or disinterestedness by the directors in responding to the demand.

In contrast to Delaware's approach, some jurisdictions have adopted uniform tests to judge both demand-required and demand-excused situations. For example, in New York, judicial review is always limited to an analysis of the independence and good faith of the board or committee and the reasonableness of its investigation; the court does not examine the reasonableness of the bases for the board's decision, nor does the court have the discretionary authority to use its independent business judgment. *Auerbach v. Bennett*, 47 N.Y.2d 619, 633-34, 419 N.Y.S.2d 920, 928-29, 393 N.E.2d 994, 1002-03 (1979). In contrast, the North Carolina Supreme Court has interpreted that state's statutory provisions on derivative actions as requiring the application of the Zapata criteria in both demand-required and demand-excused cases. *Alford v. Shaw*, 358 S.E.2d 323, 327 (N.C. 1987).

Since section 742 requires demand in all cases, the distinction between demand-excused and demand-required cases does not apply. Subsections (4) and (5) of section 744 carry forward the distinction, however, by establishing pleading rules and allocating the burden of proof

depending on whether there is a majority of independent directors. Subsection (4), like Delaware law, assigns the plaintiff the threshold burden of alleging facts establishing that majority of the board is not independent. If there is an independent majority, the burden remains with the plaintiff to plead and establish that the requirements of section 744(1) have not been met. If there is no independent majority, the burden is on the corporation on the issues delineated in section 744(1). In this case, the corporation must prove both the independence of the decision makers and the propriety of the inquiry and determination.

Subsections (4) and (5) of section 744 thus follow the first Aronson standard in allocating the burden of proof depending on whether the majority of the board is independent. The Committee on Corporate Laws decided, however, not to adopt the second Aronson standard for excusing demand (and thus shifting the burden to the corporation) based on whether the decision of the board that decided the challenged transaction is protected by the business judgment rule. The committee believes that the only appropriate concern in the context of derivative litigation is whether the board considering the demand has a disabling conflict. See *Starrels v. First Nat'l Bank*, 870 F.2d 1168, 1172-76 (7th Cir. 1989) (Easterbrook, J., concurring).

Thus, the burden of proving that the requirements of 744(1) have not been met will remain with the plaintiff in several situations. First, in subsection (2)(a), the burden of proof will generally remain with the plaintiff since the subsection requires a quorum of independent directors and a quorum is normally a majority. See section 824. The burden will also remain with the plaintiff if there is a majority of independent directors which appoints the committee under subsection (2)(b). Under section 744(6), the burden of proof also remains with the plaintiff in the case of a determination by a panel appointed by the court.

The burden of proof will shift to the corporation, however, where a majority of directors is not independent, and the determination is made by the group specified in subsection (2)(b). It can be argued that, if the directors making the determination under subsection (2)(b) are independent and have been delegated full responsibility for making the decision, the composition of the entire board is irrelevant. This argument is buttressed by the section's method of appointing the group specified in subsection (2)(b) since subsection (2)(b) departs from the general method of appointing committees and allows only independent directors, rather than a majority of the entire board, to appoint the committee which will make the determination. Nevertheless, despite the argument that the composition of the board is irrelevant in these circumstances, the Committee on Corporate Laws adopted the provisions of subsections (2)(b) and (5) of section 744 to respond to concerns of structural bias.

Finally, section 744 does not authorize the court to review the reasonableness of the determination. As discussed above, the phrase in section 744(1) "upon which its conclusions are based" limits judicial review to whether the determination has some support in the findings of the inquiry.

3. PLEADING. Pre-1998 section 740(2) provided that the complaint in a derivative proceeding must allege with particularity whether demand has been made on the board of directors and the board's response or why demand was excused. This requirement is similar to rule 23.1 of the Federal Rules of Civil Procedure. Since demand is now required in all cases, this provision is no longer necessary.

Subsection (4) sets forth a modified pleading rule to cover the typical situation where plaintiff makes demand on the board, the board rejects that demand, and the plaintiff commences an action. In that scenario, in order to state a cause of action, subsection (4) requires the complaint to allege facts with particularity demonstrating either (1) that no majority of independent directors exists or (2) why the determination does not meet the standards in subsection (1). Discovery is available to the plaintiff only after the plaintiff has successfully stated a cause of action by making either of these two showings.

30-1-745. Discontinuance or settlement. — A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

History.

I.C., § 30-1-745, as added by 1998, ch. 223, § 7, p. 766.

ABA OFFICIAL COMMENT

Section 745 follows the Federal Rules of Civil Procedure and the statutes of a number of states, and requires that all proposed settlements and discontinuances must receive judicial approval. This requirement seems a natural consequence of the proposition that a derivative suit is brought for the benefit of all shareholders and avoids many of the evils of the strike suit by preventing the individual shareholder-plaintiff from settling privately with the defendants.

Section 745 also requires notice to all affected shareholders if the court determines that the proposed settlement may substantially affect their interests. This provision permits the court to decide that no notice need be given if, in the court's judgment, the proceeding is frivolous or has become moot. The section also makes a distinction between classes of shareholders, an approach which is not in Federal Rule of Civil Procedure 23.1, but is adapted from the New York and Michigan statutes. This procedure could be used, for example, to eliminate the costs of notice to preferred shareholders where the settlement does not have a substantial effect on their rights as a class, such as their rights to dividends or a liquidation preference.

Unlike the statutes of some states, section 745 does not address the issue of which party should bear the cost of giving this notice. That is a matter left to the discretion of the court reviewing the proposed settlement.

30-1-746. Payment of expenses. — On termination of the derivative proceeding the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses, including counsel fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;

(2) Order the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(3) Order a party to pay an opposing party's reasonable expenses, including counsel fees, incurred because of the filing of a pleading, motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

History.

I.C., § 30-1-746, as added by 1998, ch. 223, § 8, p. 766.

JUDICIAL DECISIONS

Applicability.

Attorney fees were properly awarded by the trial court against a creditor who brought a frivolous suit against his debtors' attorneys, and fees on appeal also were warranted thereunder because the appeal was brought spuriously and without foundation, for the purpose of harassment. This section was inapplicable, however, because the district court's denial of leave to amend to assert derivative causes of action meant that the derivative claims were never before the court. Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010).

Because the beneficiary's claim stated a claim for an individual rather than a derivative action, this section did not apply, and the district court properly denied the corporation and majority shareholders' motion for attorney fees. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

Cited in: Kohring v. Robertson, 137 Idaho 94, 44 P.3d 1149 (2002); Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

ABA OFFICIAL COMMENT

Section 746(1) is intended to be a codification of existing case law. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). It provides that the court may order the corporation to pay the plaintiff's reasonable expenses (including counsel fees) if it finds that the proceeding has resulted in a substantial benefit to the corporation. The subsection requires that there be a "substantial" benefit to the corporation to prevent the plaintiff from proposing inconsequential changes in order to justify the payment of counsel fees. While the subsection does not specify the method for calculating attorneys' fees since there is a substantial body of court decisions delineating this issue, it does require that the expenses be reasonable which would include taking into account the amount or character of the benefit to the corporation.

Section 746(2) provides that on termination of a proceeding the court may require the plaintiff to pay the defendants' reasonable expenses, including attorney's fees, if it finds that the proceeding "was commenced or maintained without reasonable cause or for an improper purpose." The phrase "for an improper purpose" has been added to parallel Federal Rule of Civil Procedure 11 in order to prevent proceedings which may be brought to harass the corporation or its officers. The test in this section is similar to but not identical with the test utilized in section 1331, relating to dissenters' rights, where the standard for award of expenses and attorneys' fees is that dissenters "acted arbitrarily, vexatiously or not in good faith" in demanding a judicial appraisal of their shares. The derivative action situation is sufficiently different from the dissenters' rights situation to justify a different and less onerous test for imposing costs on the plaintiff. The test of section 746 that the action was brought without reasonable cause or for an improper purpose is appropriate to deter strike suits, on the one hand, and on the other hand to protect plaintiffs whose suits have a reasonable foundation.

Section 746(3) has been added to deal with other abuses in the conduct of derivative litigation which may occur on the part of the defendants and their counsel as well as by the plaintiffs and their counsel. The section follows generally the provisions of rule 11 of the Federal Rules of Civil Procedure. Section 746(3) will not be necessary in states which already have a counterpart to rule 11.

30-1-747. Applicability to foreign corporations. — In any derivative proceeding in the right of a foreign corporation, the matters covered by sections 30-1-740 through 30-1-746, Idaho Code, shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for sections 30-1-743, 30-1-745 and 30-1-746, Idaho Code.

History.

I.C., § 30-1-747, as added by 1998, ch. 223, § 9, p. 766.

ABA OFFICIAL COMMENT

Section 747 clarifies the application of the provisions of sections 30-1-740 through 30-1-747 to foreign corporations. Pre-1998 section 740 referred to proceedings in the right of both domestic and foreign corporations, but neither the section nor the comment discussed the interaction between section 740 as it applied to a foreign corporation and the law of its state of incorporation. Under generally prevailing practice, a court will look to the choice-of-law rules of the forum state to determine which law shall apply. If the issue is "procedural," the law of the forum state will apply; if the issue is "substantive," relating to the internal affairs of the corporation, the law of the state of incorporation will apply. See, e.g., *Hausman v. Buckley*, 299 F.2d 696, 700-06 (2d Cir. 1962); *Galef v. Alexander*, 615 F.2d 51 (2d Cir. 1980). Compare Restatement (Second) of Conflict of Laws §§ 302, 303, 304, 306, 309 (1988) (the local law of the state of incorporation will be applied except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 of the Restatement to the parties and the corporation or the transaction).

However, the distinction between what is procedural and what is substantive is not clear. See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-57 (1949). For example, in *Susman v. Lincoln American Corp.*, 550 F. Supp. 442, 446 n.6 (N.D. Ill. 1982), the court suggested that the standing requirement might be considered a federal procedural question under Federal Rule of Civil Procedure 23.1 and a matter of substantive law under the Delaware statute.

In view of the uncertainties created by these decisions, section 747 sets forth a choice of law provision for foreign corporations. It provides, subject to three exceptions, that the matters covered by the subchapter shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation. In this respect, the section is similar to section 901 of the Revised Uniform Limited Partnership Act which provides that the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs.

The three exceptions to the general rule are areas which are traditionally part of the forum's oversight of the litigation process: section 743, dealing with the ability of the court to stay proceedings; section 745, setting forth the procedure for settling a proceeding; and section 746, providing for the assessment of reasonable expenses (including counsel fees) in certain situations.

Part 8. Directors and Officers

30-1-801. Requirement for and duties of board of directors. — (1) Except as provided in section 30-1-732, Idaho Code, each corporation must have a board of directors.

(2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under section 30-1-732, Idaho Code.

History.

I.C., § 30-1-801, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 16, p. 907.

ABA OFFICIAL COMMENT

Section 801 requires that every corporation have a board of directors except that a corporation with a shareholder agreement authorized by section 732 may dispense with or limit the authority of the board of directors.

Obviously, some form of governance is necessary for every corporation. The board of directors is the traditional form of governance but it need not be the exclusive form. Patterns of management may also be tailored to specific needs in connection with family-controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures through a shareholder agreement under section 732.

Under section 732, an agreement among all shareholders can provide for a nontraditional form of governance until there is a regular market for the corporation's shares, a change from the 50 or fewer shareholder test in place in section 801 prior to 1990. As the number of shareholders increases and a market for the shares develops, there is (i) an opportunity for unhappy shareholders to dispose of shares-a "market out," (ii) a correlative opportunity for others to acquire shares with related expectations regarding the applicability of the statutory norms of governance, and (iii) no real opportunity to negotiate over the terms upon which the enterprise will be conducted. Moreover, tying the availability of nontraditional governance structures to an absolute number of shareholders at the time of adoption took no account of subsequent events, was overly mechanical, and was subject to circumvention. If a corporation does not have a shareholders agreement that satisfies the requirements of section 732 or a market exists for its shares as specified in section 732, it must adopt the traditional board of directors as its governing body.

Section 801(2) states that if a corporation has a board of directors "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of," the board of directors. The phrase "by or under the direction of" was chosen to encompass the varying functions of boards of directors of different corporations. In some corporations, the board of directors may be involved in the day-to-day business and affairs and it may be reasonable to describe management as being "by" the board of directors. But in most corporations, the business and affairs are managed "under the direction of" the board of directors, since the role of the board of directors consists principally of the formulation of policy, the selection of the chief executive officer and other key officers, and the approval of major actions or transactions.

It is generally recognized that the board of directors may delegate to appropriate officers, employees or agents of the corporation authority to exercise powers and perform functions not required by law to be exercised or performed by the board of directors itself. Although delegation does not relieve the board of directors from its responsibilities of oversight, directors should not be held personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have relied reasonably upon these officers, employees, or agents. See section 831 and its Official Comment. The board of directors generally has the power to probe into day-to-day management to any depth it chooses, but it has the obligation to do so only to the extent that the directors' oversight responsibilities may require.

Section 801(2) also recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation.

IDAHO REPORTER'S COMMENT

This new Model Act § 801 involves no substantive change from the first two sentences of prior I.C. § 30-1-35.

In terms of format, the matters covered in prior I.C. § 30-1-35 are broken out into several separate sections in new Model Act part 8.

30-1-802. Qualifications of directors. — The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this state or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

History.

I.C., § 30-1-802, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The elimination of mandatory special qualifications for directors is now nearly universal. The articles of incorporation or bylaws, however, may prescribe special qualifications, an option that is most likely to be utilized in closely held corporations, where qualifications for directors may be used as a device for ensuring representation and voting power on the board of directors.

IDAHO REPORTER'S COMMENT

This new Model Act § 802 is substantively identical to the third and fourth sentences of prior I.C. § 30-1-35, with only minor changes in wording.

30-1-803. Number and election of directors. — (1) A board of directors must consist of one (1) or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws.

(3) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section 30-1-806, Idaho Code.

History.

I.C., § 30-1-803, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 17, p. 907.

ABA OFFICIAL COMMENT

Section 803 prescribes rules for (i) the determination of the size of the board of directors of corporations that have not dispensed with a board of directors under section 732(1)(a), and (ii) changes in the number of directors once the board's size has been established.

1. MINIMUM NUMBER OF DIRECTORS. Section 803(1) provides that the size of the initial board of directors may be "specified in or fixed in accordance with" the articles of incorporation or bylaws. The size of the board of directors may thus be fixed initially in one or more of the fundamental corporate documents, or the decision as to the size of the initial board of directors may be made thereafter in the manner authorized in those documents.

Before 1969 the Model Act required a board of directors to consist of at least three directors. Since then, the Model Act (as well as the corporation statutes of an increasing number of states) has provided that the board of directors may consist of one or more members. A board of directors consisting of one or two individuals may be appropriate for corporations with one or two shareholders, or for corporations with more than two shareholders where in fact the full power of management is vested in only one or two persons. The requirement that every corporation have a board of directors of at least three directors may require the introduction into these closely held corporations of persons with no financial interest in the corporation.

2. CHANGES IN THE SIZE OF THE BOARD OF DIRECTORS. Section 803(2) provides a corporation with the freedom to design its articles of incorporation and bylaw provisions relating to the size of the board with a view to achieving the combination of flexibility for the board of directors and protection for shareholders that it deems appropriate. The articles of incorporation could provide for a specified number of directors or a variable-range board, thereby requiring shareholder action to change the fixed size of the board, to change the limits established for the size of the variable-range board or to change from a variable-range board to a fixed board or vice versa. An alternative would be to have the bylaws provide for a specified number of directors or a variable range for the board of directors. Any change would be made in the manner provided by the bylaws. The bylaws could permit amendment by the board of directors or the bylaws could require that any amendment, in whole or in part, be made only by the shareholders in accordance with section 1020(1). Typically the board of directors would be permitted to change the board size within the established variable range. If a corporation wishes to ensure that any change in the number of directors be approved by shareholders, then an appropriate restriction would have to be included in the articles or bylaws.

The board's power to change the number of directors, like all other board powers, is subject to compliance with applicable standards governing director conduct. In particular, it may be inappropriate to change the size of the board for the primary purpose of maintaining control or defeating particular candidates for the board. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

Experience has shown, particularly in larger corporations, that it is desirable to grant the board of directors authority to change its size without incurring the expense of obtaining shareholder approval. In closely held corporations, shareholder approval for a change in the size of the board of directors may be readily accomplished if that is desired. In many closely held corporations a board of directors of a fixed size may be an essential part of a control arrangement. In these situations, an increase or decrease in the size of the board of directors by even a single member may significantly affect control. In order to maintain control arrangements dependent on a board of directors of a fixed size, the power of the board of directors to change its own size must be negated. This may be accomplished by fixing the size of the board of directors in the articles of incorporation or by expressly negating the power of the board of directors to change the size of the board, whether by amendment of the bylaws or otherwise. See section 1020(1).

3. ANNUAL ELECTIONS OF DIRECTORS. Section 803(3) makes it clear that all directors are elected annually unless the board is staggered. See section 805 and its Official Comment.

IDAHO REPORTER'S COMMENT

Section 803 was significantly shortened and simplified in 2004 by the elimination of old subsections (2) and (3) which had set limits on changes in board size that could be made without shareholder approval. Subsection (2) now simply leaves the matter to the articles or bylaws. Subsection (1) remains unchanged. And old subsection (4) becomes new subsection (3).

As the Official Comment notes, "Section 803 (2) now provides a corporation with the freedom to design its articles ... and bylaw provisions relating to the size of the board ...."

30-1-804. Election of directors by certain classes of shareholders. — If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one (1) or more authorized classes of shares. A class, or classes, of shares entitled to elect one (1) or more directors is a separate voting group for purposes of the election of directors.

History.
I.C., § 30-1-804, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 804 makes explicit that the articles of incorporation may provide that a specified number (or all) of the directors may be elected by the holders of one or more classes of shares. This approach is widely used in closely held corporations to effect an agreed upon allocation of control, for example, to ensure minority representation on the board of directors by issuing to that minority a class of shares entitled to elect one or more directors. A class (or classes) of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors; within each voting group directors are elected by a plurality of votes and quorum and voting requirements must be separately met by each voting group. See sections 725, 726, and 728.

IDAHO REPORTER'S COMMENT

This new Model Act § 804 is an entirely new provision without specific counterpart in prior versions of the Model Act. All it really seems to do, however, is to make explicit a principle that has been universally accepted as implicit from more general sections of the Model Act dealing with the power to establish classes of shares and define the rights of each class.

30-1-805. Terms of directors generally. — (1) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(2) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under section 30-1-806, Idaho Code.

(3) A decrease in the number of directors does not shorten an incumbent director's term.

(4) A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.

(5) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors.

History.
I.C., § 30-1-805, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 805 provides for the annual election of directors at the annual shareholders' meeting with the single exception that terms may be staggered as permitted in section 806.

Section 805(3) provides that a decrease in the number of directors does not shorten the term of an incumbent director or divest any director of his office. Rather, the incumbent director's term expires at the annual meeting at which his successor would otherwise be elected.

ABA Official Text section 805(4) provides that the terms of all directors elected to fill vacancies expire at the next meeting of shareholders at which directors are elected. Thus, if terms are staggered under section 806, the term of a director elected to fill a vacant term with more than a year to run is shorter than the term of his predecessor. The board of directors may take appropriate steps, by designation of short terms or otherwise, to return the rotation of election of directors to the original terms established or fixed by the articles or bylaws. [NOTE: as discussed next below in the Idaho Reporter's Comment, Idaho has modified subsection (4) to the effect that if terms are staggered, a director filling a vacancy will serve out the predecessor's term.]

Section 805(5) provides for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting.

IDAHO REPORTER'S COMMENT

Official Text Model Act § 805, except for subsection (4), simply restates without substantive change some very basic principles from earlier versions of the Model Act [prior I.C. §§ 30-1-36 and 38]. The only changes are in language and style.

Official Text subsection (4), however, does make a substantive change from our prior I.C. § 30-1- 38, which provided that a director elected to fill a vacancy serves out the unexpired term of his predecessor. Official Text subsection (4) provides instead that the new vacancy-filling director will serve only until the next shareholders' meeting at which any directors are to be elected. This Official Text provision would be applicable only where directors' terms are staggered under section 806, and the idea would seem to be that, since the directors' power to fill a vacancy is a mere interim power to avoid the need for a special shareholders' meeting, if there is going to be a shareholders' meeting anyway, then the vacancy-filling director selected by the other directors should be put before the shareholders for their acceptance or rejection, whether or not his predecessor's term has expired.

The Idaho revisers rejected this idea and retained in new subsection (4) the prior I.C. § 30-1-38 provision that a director elected to fill a vacancy serves out the unexpired term of his predecessor.

30-1-806. Staggered terms for directors. — The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two (2) or three (3) groups, with each group containing one-half (1/2) or one-third (1/3) of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two (2) or three (3) years, as the case may be, to succeed those whose terms expire.

History.
I.C., § 30-1-806, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 18, p. 907.

ABA OFFICIAL COMMENT

Section 806 recognizes the practice of "classifying" the board or "staggering" the terms of directors so that only one-half or one-third of them are elected at each annual shareholders' meeting and directors are elected for two- or three-year terms rather than one-year terms.

The traditional purpose of a staggered board has been to assure the continuity and stability of the corporation's business strategies and policies as determined by the board. In recent years the practice has been employed with increasing frequency to ensure that a majority of the board of directors remains in place following a sudden change in shareholdings or a proxy contest. It

also reduces the impact of cumulative voting since a greater number of votes is required to elect a director if the board is staggered than is required if the entire board is elected at each annual meeting. A staggered board of directors also can have the effect of making unwanted takeover attempts more difficult, particularly where the articles of incorporation provide that the shareholders may remove directors only with cause or by a supermajority vote, or both.

IDAHO REPORTER'S COMMENT

As enacted in Idaho in 1997, Model Act § 806 made no substantive change from 1969 Model Act § 37 [prior I.C. § 30-1-37]. The only changes from prior versions of this section were in language and style.

Idaho has an interesting history with respect to the law on staggered, or "classified," boards. Prior to the 1979 revision, Idaho had no statutory or case law on classification of directors. Until its 1982 amendment by the people of Idaho, Id. Const., Art. XI, § 4 had required cumulative voting for directors. The Idaho Bar committee for the 1979 revision therefore decided to "outlaw" classification of directors and to require annual election of all directors on the grounds that staggering's "basic concept is inherently inconsistent with constitutionally-mandated cumulative voting and serves only to help entrench incumbent management." However, following the 1982 constitutional amendment removing the cumulative voting requirement, the 1983 Idaho Legislature adopted 1969 Model Act § 37 [prior I.C. § 30-1-37], thereby following all but one state (California) in allowing for staggered boards. Your reporter retains some slight misgivings about staggered boards (not because he was born, raised and educated in California). Although the cumulative voting rationale is not longer of constitutional weight, it is still there. More generally, there remains the entrenched management rationale. Finally, there is also the anti-takeover bias. The 1997 revisers as a whole, however, determined that these "philosophical" problems with allowing staggering are outweighed by the continuity, flexibility and uniformity advantages. The result is that § 806 continues the prior § 37 allowance for staggered boards.

A 2004 amendment eliminated the requirement that the board consist of at least nine members before "staggering" of their terms is allowed.

30-1-807. Resignation of directors. — (1) A director may resign at any time by delivering written notice to the board of directors, its chairman, or the corporation.

(2) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

History.

I.C., § 30-1-807, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The resignation of a director is effective when the written notice is delivered unless the notice specifies a later effective date, in which case the director continues to serve until that later date. Since the person giving the notice is still a member of the board, he may participate in all decisions until the specified date, including the choice of his successor under section 810. The participation of the retiring director in the decision on his successor may be of importance in closely held corporations where control of the board may be affected by the resignation.

Vacancies created by a resignation effective at a later date may be filled before that date under section 810.

IDAHO REPORTER'S COMMENT

New Model Act § 810 is an entirely new section that simply codifies long-existing practice. It is based on the Delaware statute, with stylistic changes. There have been no similar provisions in prior versions of the Model Act.

30-1-808. Removal of directors by shareholders. — (1) The shareholders may remove one (1) or more directors with or without cause unless

the articles of incorporation provide that directors may be removed only for cause.

(2) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(3) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(4) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is removal of the director.

History.

I.C., § 30-1-808, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 808(1) accepts the view that since the shareholders are the owners of the corporation, they should normally have the power to change the directors at will. This section reverses the common law position that directors have a statutory entitlement to their office and can be removed only for cause--fraud, criminal conduct, gross abuse of office amounting to a breach of trust, or similar conduct. The power to remove directors is subject to several restrictions set forth in section 808:

(1) The power to remove a director without cause maybe eliminated by a provision in the articles of incorporation. Such a provision in effect guarantees the directors the same entitlement to office that directors enjoyed at common law. It is likely to be used in closely held corporations as an element of an agreed upon allocation of power and control which ensures directors immunity from removal except for cause. It may also be used in publicly held corporations that fear changes in ownership of the majority of the shares and desire to provide security to the directors.

(2) If the articles of incorporation provide that one or more classes of shares constitute a separate voting group entitled to elect a director (see section 804), only the shareholders of that voting group may participate in the vote whether or not to remove that director. But that director may be removed by court proceeding under section 809 despite this section.

(3) If cumulative voting is not authorized, a director is removed (with or without cause) only if the votes cast to remove him exceed the votes cast to retain him at a meeting of the voting group electing him at which a quorum of shares entitled to vote on his election is present.

(4) If cumulative voting is authorized, a different standard for removal is involved. Under cumulative voting, a director may be removed (with or without cause) only if the votes cast in favor of retaining him would not have been sufficient to elect him pursuant to cumulative voting at that meeting. This provision guarantees that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. The director, however, may be removed by court proceeding under section 809 despite this section. In computing whether or not a director elected by cumulative voting is protected from removal from office by section 808(3), the votes should be counted as though (1) the vote to remove the director occurred in an election to elect the number of directors normally elected by the voting group along with the director whose removal is sought, (2) the number of votes cast cumulatively against removal of the director had been cast for his election, and (3) all votes cast for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of his office.

Removal of directors under section 808(4) requires the meeting notice to state that removal of specific directors will be proposed.

IDAHO REPORTER'S COMMENT

New Model Act § 808 is nearly identical in substance to 1969 Model Act § 39 [prior I.C.

§ 30-1-39]. There are some language and style changes and some elaboration and updating, for example in subsections (2) and (3) to reflect the voting group concept and the change in section 725 that actions by shareholders are generally adopted when the vote in favor exceeds the vote opposed.

The only substantive change is that subsection (1) expressly permits the articles of incorporation to eliminate the power of shareholders to remove directors without cause, a power that might not be appropriate in some closely-held situations.

30-1-809. Removal of directors by judicial proceeding. — (1) The Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may remove a director of the corporation from office in a proceeding commenced by or in the right of the corporation if the court finds that:

(a) The director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation; and

(b) Considering the director's course of conduct and the inadequacy of other available remedies, removal would be in the best interest of the corporation.

(2) A shareholder proceeding on behalf of the corporation under subsection (1) of this section shall comply with all the requirements of sections 30-1-741 through 30-1-747, Idaho Code, except section 30-1-741(1), Idaho Code.

(3) The court, in addition to removing the director, may bar the director from reelection for a period prescribed by the court.

(4) Nothing in this section limits the equitable powers of the court to order other relief.

History.

I.C., § 30-1-809, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 19, p. 907; am. 2007, ch. 314, § 10, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "where a corporation's principal office is located, or, if none in this state, Ada county" for "where a corporation's principal office, or, if none in this state, its registered office, is located" in the introductory paragraph in subsection (1).

ABA OFFICIAL COMMENT

Section 809 is designed to operate in the limited circumstance where other remedies are inadequate to address serious misconduct by a director and it is impracticable for shareholders to invoke the usual remedy of removal under section 808. In recognition that director election and removal are principal prerogatives of shareholders, section 809 authorizes judicial removal of a director who is found to have engaged in serious misconduct as described in subsection (1)(a) if the court also finds that, taking into consideration the director's course of conduct and the inadequacy of other available remedies, removal of the director would be in the best interest of the corporation. Misconduct serious enough to justify the extraordinary remedy of judicial removal does not involve any matter falling within an individual director's lawful exercise of business judgment, no matter how unpopular the director's views may be with the other members of the board. Policy and personal differences among the members of the board of directors should be left to be resolved by the shareholders.

Section 809(4) makes it clear that the court is not restricted to the removal remedy in actions under this section but may order any other equitable relief. Where, for example, the complaint concerns an ongoing course of conduct that is harmful to the corporation, the court may enjoin the director from continuing that conduct. In another instance, the court may determine that

the director's continuation in office is inimical to the best interest of the corporation. Judicial removal might be the most appropriate remedy in that case if shareholder removal under section 808 is impracticable because of situations like the following:

(1) The director charged with serious misconduct personally owns or controls sufficient shares to block removal.

(2) The director was elected by voting group or cumulative voting, and the shareholders with voting power to prevent his removal will exercise that power despite the director's serious misconduct and without regard to what the court deems to be the best interest of the corporation.

(3) A shareholders' meeting to consider removal under section 808 will entail considerable expense and a period of delay that will be contrary to the corporation's best interest.

A proceeding under this section may be brought by the board of directors or by a shareholder suing derivatively. If an action is brought derivatively, all of the provisions of I.C. §§ 30-1-740 through 747, including dismissal under section 744, are applicable to the action with the exception of the contemporaneous ownership requirement of section 741(1).

Section 809 is designed to interfere as little as possible with the usual mechanisms of corporate governance. Accordingly, except for limited circumstances such as those described above, where shareholders have reelected or declined to remove a director with full knowledge of the director's misbehavior, the court should decline to entertain an action for removal under section 809. It is not intended to permit judicial resolution of internal corporate disputes involving issues other than those specified in subsection (1)(a).

IDAHO REPORTER'S COMMENT

Section 809 was entirely new to the Model Act when enacted in Idaho in 1997 and was based generally on the California statute, with both stylistic and substantive changes. The idea was to provide an alternative method (other than section 808 shareholder action) for removing directors for cause.

A little more than half the jurisdictions as of 2004 provided for court-ordered removal of directors for cause, with our neighbors Montana, Oregon, Utah, Washington and Wyoming all having adopted section 809 without substantive change.

The 1997 revisers decided to designate the district court in the county where a corporation's principal office is located to hear any such actions.

Section 809 was revised significantly in 2004. First, the existing distinction between 10 percent and "lesser" shareholders was eliminated. Under the new, improved section 809 the action to remove a director gone bad can be brought either by the corporation directly or by a shareholder suing derivatively. If it's a derivative suit, subsection (2) subjects the case to all the requirements of derivative suits, except the contemporaneous ownership requirement.

Second, the grounds for judicial removal of a miscreant director at the end of subsection (1) were tightened and clarified.

Third, a new subsection (4) was added to emphasize the flexibility of the court's equity powers.

30-1-810. Vacancy on board. — (1) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The shareholders may fill the vacancy;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders.

(3) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 30-1-807(2), Idaho Code, or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

History.
I.C., § 30-1-810, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Vacancies on the board of directors may be filled either by the shareholders or by the board of directors. In large corporations the cost of calling a special meeting of shareholders may be prohibitive so that in those corporations filling vacancies by the board of directors is the norm. On the other hand, in a closely held corporation the shareholders may fill vacancies as readily as the board.

Section 810(1)(c) allows the directors remaining in office to fill vacancies even though they are fewer than a quorum. The test for the exercise of this power is whether the directors remaining in office are fewer than a quorum, not whether the directors seeking to act are fewer than a quorum. For example, on a board of six directors where a quorum is four, if there are two vacancies, they may not be filled under section 810(1)(c) at a "meeting" attended by only three directors. Even though the three directors are fewer than a quorum, section 810(1)(c) is not applicable because the number of directors remaining in office — four — is not fewer than a quorum.

Section 810(2) provides that if a voting group of shares is entitled to elect a director, only that voting group is entitled to fill a vacant office which was held by a director elected by that voting group. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See sections 140, 725, 726, 728, 804 and 808(2).

Section 810(3) permits vacancies that will arise on a specific later date to be filled in advance of that date so long as the designee does not actually take office until the vacancy occurs. The director in the office that will become vacant may participate in the selection of his successor. A vacancy arising at a later date is most likely to arise because of a resignation effective at a later date; it may also arise in connection with retirements or with prospective amendments to bylaws. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance caused by the resignation.

IDAHO REPORTER'S COMMENT

New Model Act § 810(1) is based on 1969 Model Act § 38 [prior I.C. § 30-1-38] with stylistic changes. In addition, new subsection (1)(c) clarifies that the reference to "fewer than a quorum" is to the directors remaining in office.

New subsections (2) and (3) are entirely new but seem merely to codify generally understood principles concerning the filling of director vacancies. Subsection (2) reflects the general introduction into the Model Act of the concept of voting groups.

Again, five of our six immediate neighboring states have adopted section 810 without significant change.

30-1-811. Compensation of directors. — Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

History.
I.C., § 30-1-811, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

This section puts at rest the question whether the board of directors can fix the compensation of its members for serving as directors. The practice of compensating directors is now of long standing, and the establishment of a policy with respect to director compensation is an appropriate function of the board of directors.

In publicly held corporations, compensation is customarily provided to nonmanagement directors. As stated in *The Corporate Director's Guidebook,* "... it is expected that a

nonmanagement director will devote substantial attention to the affairs of the corporation and will be compensated accordingly." 33 Bus. Law. 1591, 1622 (1978).

IDAHO REPORTER'S COMMENT

New Model Act § 811 follows the language of earlier versions of the Model Act [e.g., prior I.C. § 30-1-35, first paragraph, last sentence] with only very minor stylistic changes.

30-1-812 — 30-1-819. [Reserved.]

30-1-820. Meetings. — (1) The board of directors may hold regular or special meetings in or out of this state.

(2) Unless the articles of incorporation or bylaws provide otherwise, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

History.
I.C., § 30-1-820, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

This section authorizes meetings of directors anywhere. No distinction is made between meetings in-state and out-of-state. It also authorizes the board of directors to permit any or all directors to participate in a meeting by the use of any means of communication by which all directors participating may simultaneously hear each other. Under the ABA Official Text this decision is discretionary with the board of directors, [but NOTE that under new I.C. § 30-1-820(2) the decision is for the individual directors themselves] and a person participating in this fashion is deemed to be present in person at the meeting for purposes of quorum and voting requirements.

With the development of modern electronic technology, it is possible that the advantages of the traditional meeting, at which all members are present at a single place, may be obtained even though the members are physically dispersed and no two directors are present at the same place. The advantage of the traditional meeting is the opportunity for interchange that is permitted by a meeting in a single room at which members are physically present. If this opportunity for interchange is thought to be available by the directors, a meeting may be conducted by electronic means although no two directors are physically present at the same place and no specific place for the meeting is designated.

IDAHO REPORTER'S COMMENT

New Model Act § 820 is substantially the same as prior I.C. § 30-1-43, first and third paragraphs.

Section 820(1) restates the first sentence of prior I.C. § 30-1-43 with only minor stylistic changes.

Section 820(2) updates and further refines the "conference call meeting" idea of prior I.C. § 30-1-43, third paragraph. The description of the communications equipment permitted as a substitute for actual presence at a board meeting has been broadened to anticipate future technology. In addition, the use of such technology as a substitute for actual attendance is made a discretionary decision for the board under the Official Text rather than an apparent right of individual directors, as seems the case under our prior wording. The 1997 revision retained our existing approach by substituting in subsection (2) the words "any or all directors may participate" for the Official Text's "the board of directors may permit any or all directors to participate."

30-1-821. Action without meeting. — (1) Except to the extent that

the articles of incorporation or bylaws require that action by the board of directors be taken at a meeting, action required or permitted by this act to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action to be taken and delivers it to the corporation.

(2) Action taken under this section is the act of the board of directors when one (1) or more consents signed by all the directors are delivered to the corporation. The consent may specify the time at which the action taken thereunder is to be effective. A director's consent may be withdrawn by a revocation signed by the director and delivered to the corporation prior to delivery to the corporation of unrevoked written consents signed by all the directors.

(3) A consent signed under this section has the effect of action taken at a meeting of the board of directors and may be described as such in any document.

History.

I.C., § 30-1-821, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 20, p. 907.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in subsection (1) refers to S.L. 1997, ch. 366, which codified the Idaho Business Corporation Act throughout title 30, Idaho Code.

JUDICIAL DECISIONS

Waiver of Claims.

Where a physician sued medical center for wrongful termination, but had entered into agreements with all the directors, in which the medical center bought out the physician's stock in the corporation, the physician argued that the procedural irregularities (the same conduct the district judge found the physician waived) impacted tne physician's claims for breach of good faith and fair dealing, interference with an existing contract, and interference with an economic advantage, and this section; because these claims were barred by waiver, there was no error in dismissing them as well. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002).

ABA OFFICIAL COMMENT

The power of the board of directors to act unanimously without a meeting is based on the pragmatic consideration that in many situations a formal meeting is a waste of time. For example, in a closely held corporation there will often be informal discussion by the manager-owners of the venture before a decision is made. And, of course, if there is only a single director (as is permitted by section 803), a written consent is the natural method of signifying director action. Consent may be signified on one or more documents if desirable. The consent document may specify the time at which the action taken thereunder is to become effective.

In publicly held corporations, formal meetings of the board of directors may be appropriate for many actions. But there will always be situations where prompt action is necessary and the decision noncontroversial, so that approval without a formal meeting may be appropriate.

Under section 821 the requirement of unanimous consent precludes the possibility of stifling or ignoring opposing argument. A director opposed to an action that is proposed to be taken by unanimous consent, or uncertain about the desirability of that action, may compel the holding of a directors' meeting to discuss the matter simply by withholding his consent.

IDAHO REPORTER'S COMMENT

When enacted in 1997, section 821 was substantively the same as 1969 Model Act § 44 [prior I.C. § 30-1-44], with the addition of some detail. There were also language and style changes.

The prior reference to committee action in old I.C. § 30-1-44 was dropped in section 821 but picked up in section 825(3).

The 2004 amendments to section 821 were threefold: (1) Section 821(1) was revised to simplify the language and to clarify that while the articles or bylaws may require that some or all actions by the board of directors be taken at a meeting, action taken without a meeting by consent must be unanimous. (2) Subsection (2) was changed to clarify that action taken by consent in lieu of a meeting becomes the act of the board of directors when one or more consents signed by all of the directors are delivered to the corporation. A new sentence was added to clarify the effect of a revocation of a consent by a director. (3) Each of the three subsections was revised for the purposes of clarity.

30-1-822. Notice of meeting. — (1) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place or purpose of the meeting.

(2) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two (2) days' notice of the date, time and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

History.

I.C., § 30-1-822, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Regular meetings of the board of directors may be held without notice and special meetings require only two days' notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written or oral. Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of fundamental differences in their roles: directors are expected to be more closely involved in corporate affairs than shareholders, and meetings of directors are held more systematically and regularly than meetings of shareholders.

IDAHO REPORTER'S COMMENT

There are several differences between this new Model Act § 822 and prior I.C. § 30-1-43 (which was an amalgam from 1969 Model Act § 43 and the old pre-1979 I.C. § 30-139).

(1) Prior I.C. § 30-1-43 covers committee as well as full board meetings. This new § 822 is applied to committees through new section 825(3).

(2) New section 822 requires no notice for regular meetings, only special. Prior I.C. § 30-1-43 made no distinction here between regular and special meetings, requiring three days written notice for both. The 1997 revision assumes that corporations will have no difficulty distinguishing between "regular" and "special" board meetings.

(3) With respect to special meetings, prior I.C. § 30-1-43 required notice of the purposes of any such meeting. New section 822(2) drops this requirement.

(4) Prior I.C. § 30-1-43 required three days prior notice; new section 822 reduces this to two days.

(5) New section 822 drops any writing requirement.

30-1-823. Waiver of notice. — (1) A director may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (2) of this section, the waiver must be filed in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(2) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting, or promptly upon his arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

History.
I.C., § 30-1-823, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Cited in: Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002).

ABA OFFICIAL COMMENT

Section 823(1) reverses the common law rule that invalidates waivers of notice by directors after the date and time of the meeting. In modern practice notice is often a technical requirement and waivers should be freely permitted.

Section 823(2) recognizes that the function of notice is to inform directors of a meeting. If a director actually appears at the meeting he has probably had notice of it and generally should not be able to raise a technical objection that he was not given notice.

In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, the director must call attention to the defect at the outset of the meeting or promptly upon his arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice. If a director properly objects to the meeting being held, he is not presumed to have assented to actions taken thereafter, but he waives his objection if he thereafter votes for or assents to action taken at the meeting. See section 824(4).

IDAHO REPORTER'S COMMENT

New Model Act § 823(1) closely parallels prior I.C. § 30-1-144, with stylistic and language changes and with somewhat greater specification of detail.

New § 823(2) closely parallels prior I.C. § 30-1-43's second paragraph, second sentence, and clarifies the reason why actual attendance normally waives any defect in the notice and further describes what a director must do if he desires to preserve an objection based on any defect in the notice.

30-1-824. Quorum and voting. — (1) Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this chapter, a quorum of a board of directors consists of:

(a) A majority of the fixed number of directors if the corporation has a fixed board size; or

(b) A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(2) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third (1/3) of the fixed or prescribed number of directors determined under subsection (1) of this section.

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(4) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(a) He objects at the beginning of the meeting, or promptly upon his arrival, to holding it or transacting business at the meeting;

(b) His dissent or abstention from the action taken is entered in the minutes of the meeting; or

(c) He delivers written notice of his dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

History.

I.C., § 30-1-824, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Waiver of Claims.

Where a physician sued medical center for wrongful termination, but had entered into agreements with all the directors, in which the medical center bought out the physician's stock in the corporation, the physician argued that the procedural irregularities (the same conduct the district judge found the physician waived) impacted the physician's claims for breach of good faith and fair dealing, interference with an existing contract, and interference with an economic advantage, and § 30-1-821; because these claims were barred by waiver, there was no error in dismissing them as well. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002).

ABA OFFICIAL COMMENT

In the absence of a provision in the articles of incorporation or bylaws, a quorum is determined as follows:

(1) If the board of directors consists of a fixed number — whether fixed by the board or shareholders under section 803(2) — a quorum is a majority of that number. Thus, if a board of directors has a fixed membership of 15, a quorum is 8. If the board of directors has exercised its power under section 803(2) to increase its size to 19, a quorum is 10; if it reduced its size to 12, a quorum is 7.

(2) If the board of directors is a variable size board, a quorum consists of a majority of the number of directors prescribed at that time by the board of directors or shareholders. If no number is prescribed, then a quorum consists of a majority of the directors in office immediately before the meeting begins.

Section 824(1) provides that the articles of incorporation or bylaws may provide for a greater number than specified in clauses (a) and (b) for a quorum of the board. Section 824(1) also recognizes that the Act itself may provide for a different quorum in certain specified situations. See sections 853(3)(a) and 855(2)(a).

Section 824(2) provides that the articles of incorporation or bylaws may decrease the size of the quorum to one-third of the number of directors determined under section 824(1).

Section 824(1) allows the articles of incorporation or bylaws to increase the quorum up to and including unanimity while section 824(3) allows these documents similarly to increase the vote necessary to take action. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to section 804. The option to increase either or both the vote and quorum requirements most commonly is exercised in closely held corporations where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate action.

The phrase "when the vote is taken" in section 824(3) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

Under section 824(4) directors, if they object or abstain with respect to action taken by the board of directors or a committee of the board of directors, must make their position clear in one of the ways described in this subsection. If objection is made in the form of a written dissent, it may be transmitted by wire, telecopier, or other medium of data transmission. This written objection serves the important purpose of forcefully bringing the position of the dissenting member to the attention of the balance of the board of directors. The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. The right of dissent or abstention is not available to a director who voted in favor of the action taken.

Section 824(4) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

IDAHO REPORTER'S COMMENT

New Model Act § 824, subsection (1) retains the traditional majority standard for quorums with an elaboration to accommodate the variable-range size board authorized by new section 803.

Subsection (2) is entirely new to the Model Act. It is based on the statutes of Delaware and other states and provides useful flexibility for publicly held companies with large boards.

Subsection (3) follows the traditional majority of the quorum approach to voting but adds specificity in its first clause to the effect that a quorum must actually be present when any specific vote is taken. This is new to the Model Act and is taken from the New York statute. It resolves an issue on which there was some uncertainty in the absence of statutory specification.

Subsection (4) is based on 1969 Model Act § 35's final paragraph [prior I.C. § 30-1-35], but the manner for communicating dissent has been simplified.

30-1-825. Committees. — (1) Unless this chapter, the articles of incorporation or the bylaws provide otherwise, a board of directors may create one (1) or more committees and appoint one (1) or more members of the board of directors to serve on any such committee.

(2) Unless this chapter otherwise provides, the creation of a committee and appointment of members to it must be approved by the greater of:

(a) A majority of all the directors in office when the action is taken; or

(b) The number of directors required by the articles of incorporation or bylaws to take action under section 30-1-824, Idaho Code.

(3) Sections 30-1-820 through 30-1-824, Idaho Code, apply both to committees of the board and to their members.

(4) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the powers of the board of directors under section 30-1-801, Idaho Code.

(5) A committee may not, however:

(a) Authorize or approve distributions, except according to a formula or method, or within limits, prescribed by the board of directors;

(b) Approve or propose to shareholders action that this chapter requires be approved by shareholders;

(c) Fill vacancies on the board of directors or, subject to subsection (7) of this section, on any of its committees; or

(d) Adopt, amend or repeal bylaws.

(6) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 30-1-830, Idaho Code.

(7) The board of directors may appoint one (1) or more directors as alternate members of any committee to replace any absent or disqualified member during the member's absence or disqualification. Unless the

articles of incorporation or the bylaws or the resolution creating the committee provide otherwise, in the event of the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, unanimously, may appoint another director to act in place of the absent or disqualified member.

History.
I.C., § 30-1-825, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 21, p. 907.

ABA OFFICIAL COMMENT

Section 825 makes explicit the common law power of a board of directors to act through committees of directors and specifies the powers of the board of directors that are nondelegable, that is, powers that only the full board of directors may exercise. Section 825 deals only with board committees exercising the powers or performing the functions of the board of directors; the board of directors or management, independently of section 825, may establish nonboard committees composed of directors, employees, or others to exercise corporate powers not required to be exercised by the board of directors.

Section 825(2) states that, unless this Act otherwise provides, a committee of the board of directors may be created only by the affirmative vote of a majority of the board of directors then in office, or, if greater, by the number of directors required to take action by the articles of incorporation or the bylaws. This super-majority requirement reflects the importance of the decision to invest board committees with power to act under section 825. Section 744(2) requires that a special litigation committee, to consider whether the maintenance of a derivative action is in the corporation's best interest, be appointed by a majority vote of independent directors present at a meeting of the board. Sections 855(2) and 862(1), respectively, contain a similar requirement with regard to the appointment of a committee to consider whether indemnification is permissible and the appointment of a committee to consider approval of a director conflicting interest transaction.

Committees of the board of directors are assuming increasingly important roles in the governance of publicly held corporations. See "Corporate Director's Guidebook, 1994 Edition," 49 Bus. Law. 1243 (1994). Nominating and compensation committees, composed primarily or entirely of nonmanagement directors, are widely used by publicly held corporations. Audit committees perform important review functions assigned to them by the board of directors.

Section 825(1) permits a committee to consist of a single director. This accommodates situations in which only one director may be present or available to make a decision on short notice, as well as situations in which it is unnecessary or inconvenient to have more than one member on a committee. Committees also are often employed to decide matters in which other members of the board have a conflict of interest; in such a case, a court will typically scrutinize with care the committee's decision when it is the product of a lone director. See, e.g., *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). Additionally, various sections of the Model Act require the participation or approval of at least two independent directors in order for the decision of the board or committee to have effect. These include a determination that maintenance of a derivative suit is not in the corporation's best interests (section 744(2)(c)), a determination that indemnification is permissible (section 855(2)(a)) and an approval of a director conflicting interest transaction (section 862(1)).

Section 825 limits the role of board committees in light of competing policies: on the one hand, it seems clear that appropriate committee action is not only desirable but is also likely to improve the functioning of larger and more diffuse boards of directors; on the other hand, wholesale delegation of authority to a board committee, to the point of abdication of director responsibility as a board of directors, is manifestly inappropriate and undesirable. Overbroad delegation also increases the potential, where the board of directors is divided, for usurpation of basic board functions by means of delegation to a committee dominated by one faction.

The statement of nondelegable functions set out in section 825(5) is based on the principle that prohibitions against delegation to board committees should be limited generally to actions that substantially affect the rights of shareholders or are fundamental to the governance of the corporation. As a result, delegation of authority to committees under section 825(5) may be broader than mere authority to act with respect to matters arising within the ordinary course of business.

Section 825(5) prohibits delegation of authority with respect to most mergers, sales of substantially all the assets, amendments to articles of incorporation and voluntary dissolution

since these require shareholder action. In addition, section 825(5) prohibits delegation to a board committee of authority to fill board vacancies, subject to subsection (7), or to amend the bylaws. On the other hand, under section 825(5) many actions of a material nature, such as the authorization of long-term debt and capital investment or the issuance of shares, may properly be made the subject of committee delegation. In fact, the list of nondelegable powers has been reduced from the prior formulation of section 825(5).

Although section 825(5)(a) generally makes nondelegable the decision whether to authorize or approve distributions, including dividends, it does permit the delegation to a committee of power to approve a distribution pursuant to a formula or method or within limits prescribed by the board of directors. Therefore, the board could set a dollar range and timeframe for a prospective dividend and delegate to a committee the authority to determine the exact amount and record and payment dates of the dividend. The board also could establish certain conditions to the payment of a distribution and delegate to a committee the power to determine whether the conditions have been satisfied.

The statutes of several states make nondelegable certain powers not listed in section 825(5) — for example, the power to change the principal corporate office, to appoint or remove officers, to fix director compensation, or to remove agents. These are not prohibited by section 825(5) since the whole board of directors may reverse or rescind the committee action taken, if it should wish to do so, without undue risk that implementation of the committee action might be irrevocable or irreversible.

Section 825(6) makes clear that although the board of directors may delegate to a committee the authority to take action, the designation of the committee, the delegation of authority to it, and action by the committee does not alone constitute compliance by a noncommittee board member with the director's responsibility under section 830. On the other hand, a noncommittee director also does not automatically incur personal risk should the action of the particular committee fail to meet the standard of conduct set out in section 830. The noncommittee member's liability in these cases will depend upon whether the director's conduct was actionable under section 831. Factors to be considered in this regard will include the care used in the delegation to and supervision over the committee, and the amount of knowledge regarding the actions being taken by the committee which is available to the noncommittee director. Care in delegation and supervision may be facilitated, in the usual case, by review of minutes and receipt of other reports concerning committee activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and avoid liability simply by delegating authority to board committees. Rather, a director against whom liability is asserted based upon acts of a committee of which the director is not a member avoids liability under section 831 by an appropriate measure of monitoring — particularly if the director met the standards contained in section 830 with respect to the creation and supervision of the committee.

Section 825(6) has no application to a member of the committee itself. The standards of conduct applicable to a committee member are set forth in section 830.

Section 825(7) is a rule of convenience that permits the board or the other committee members to replace an absent or disqualified member during the time that the member is absent or disqualified. Unless otherwise provided, replacement of an absent or disqualified member is not necessary to permit the other committee members to continue to perform their duties.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, section 825 refined 1969 Model Act § 42 [prior I.C. § 30-1-42] without making any very significant substantive change. Among the more significant refinements your reporter noted the following: (1) The introductory language of section 825(1) was changed from old § 42's "if the articles of incorporation or the bylaws so provide" to "unless the articles of incorporation or bylaws provide otherwise." This change recognized the increased use of committees. (2) Subsection (2) expressly recognized that articles of incorporation or bylaws might require a supermajority vote to create committees and appoint members. (3) Subsection (3) consolidated in a single section references to committees that previously appeared in several sections in the 1969 Model Act. (4) Subsection (5)(d) was added since it seemed inappropriate to the ABA Committee to permit a committee of directors to amend the articles of incorporation in any way.

In 2004 section 825 was revised in several ways. First, single member committees are now authorized by subsection (1). Second, the list of non-delegable board powers in subsection (5) was reduced by eliminating old subsections (5) (d) (amend articles under section 1002), (f) (approve "short-form" merger) (g) (approve share reacquisition without board formula) and (h)

(issue shares or designate relative rights among shareholders without specific board limits). Subsection (5) (a) was also amended to allow a committee to apply a distributions formula or method fixed by the whole board, but still not to actually authorize or approve a distribution. Third and finally in terms of substantive change, a new subsection (7) was added to provide for the replacement of absent or disqualified committee members.

30-1-826 — 30-1-829. [Reserved.]

30-1-830. Standards for directors. — (1) Each member of the board of directors, when discharging the duties of a director, shall act:

(a) In good faith; and

(b) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(3) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection (5)(a) or (5)(c) of this section to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one (1) or more of the board's functions that are delegable under applicable law.

(4) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data prepared or presented by any of the persons specified in subsection (5) of this section.

(5) A director is entitled to rely, in accordance with subsection (3) or (4) of this section, on:

(a) One (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinion, reports or statements provided;

(b) Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters:

(i) Within the particular person's professional or expert competence; or

(ii) As to which the particular person merits confidence; or

(c) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

History.
I.C., § 30-1-830, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 22, p. 907.

ABA OFFICIAL COMMENT

Section 830 defines the general standards of conduct for directors. Under subsection (1), each board member must always perform a director's duties in good faith and in a manner

reasonably believed to be in the best interests of the corporation. Although each director also has a duty to comply with its requirements, the focus of subsection (2) is on the discharge of those duties by the board as a collegial body. Under subsection (2), the members of the board or a board committee are to perform their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances. This standard of conduct is often characterized as a duty of care.

Section 830 sets forth the standards of conduct for directors by focusing on the manner in which directors perform their duties, not the correctness of the decisions made. These standards of conduct are based on former section 35 of the 1969 Model Act, a number of state statutes and on judicial formulations of the standards of conduct applicable to directors. Section 830 should be read in light of the basic role of directors set forth in section 801(2), which provides that the "business and affairs of a corporation [shall be] managed by or under the direction of" the board, as supplemented by various provisions of the Act assigning specific powers or responsibilities to the board. Relevant thereto, directors often act collegially in performing their functions and discharging their duties. If the observance of the directors' conduct is called into question, courts will typically evaluate the conduct of the entire board (or committee). Deficient performance of section 830 duties on the part of a particular director may be overcome, absent unusual circumstances, by acceptable conduct (meeting, for example, subsection (2)'s standard of care) on the part of other directors sufficient in number to perform the function or discharge the duty in question. While not thereby remedied, the deficient performance becomes irrelevant in any evaluation of the action taken. (This contrasts with a director's duty of loyalty and fair dealing, which will be evaluated on an individual basis and will also implicate discharge of the director's duties under subsection (1).) Further relevant thereto, the board may delegate or assign to appropriate officers, employees or agents of the corporation the authority or duty to exercise powers that the law does not require it to retain. Since the directors are entitled to rely thereon absent knowledge making reliance unwarranted, deficient performance of the directors' section 830 duties will not result from their delegatees' actions or omissions so long as the board complied with the standards of conduct set forth in section 8.30 in delegating responsibility and, where appropriate, monitoring performance of the duties delegated.

In earlier versions of the Model Act the duty of care element was included in subsection (1), with the text reading: "[a] director shall discharge his duties ... with the care an ordinarily prudent person in a like position would exercise under similar circumstances." The use of the phrase "ordinarily prudent person" in a basic guideline for director conduct, suggesting caution or circumspection vis-a-vis danger or risk, has long been problematic given the fact that risk-taking decisions are central to the directors' role. When coupled with the exercise of "care," the prior text had a familiar resonance long associated with the field of tort law. See the Official Comment to section 831. The further coupling with the phrasal verb "shall discharge" added to the inference that former section 830(1)'s standard of conduct involved a negligence standard, with resultant confusion. In order to facilitate its understanding and analysis, independent of the other general standards of conduct for directors, the duty of care element has been set forth as a separate standard of conduct in subsection (2).

Long before statutory formulations of directors' standards of conduct, courts would invoke the business judgment rule in evaluating directors' conduct and determining whether to impose liability in a particular case. The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts. Section 830 does not try to codify the business judgment rule or to delineate the differences between that defensive rule and the section' s standards of director conduct. Section 830 deals only with standards of conduct — the level of performance expected of every director entering into the service of a corporation and undertaking the role and responsibilities of the office of director. The section does not deal directly with the liability of a director — although exposure to liability will usually result from a failure to honor the standards of conduct required to be observed by subsection (1). See clauses (i) and (ii)(A) of section 831(1)(b). The issue of directors' liability is addressed in sections 831 and 833. Section 830 does, however, play an important role in evaluating a director's conduct and the effectiveness of board action. It has relevance in assessing, under section 831, the reasonableness of a director's belief. Similarly, it has relevance in assessing a director's timely attention to appropriate inquiry when particular facts and circumstances of significant concern materialize. It serves as a frame of reference for determining, under section 833(1), liability for an unlawful distribution. Further, compliance with the section is important under section 862 for board action to be effective, under section 861(2)(a), to protect (i) a director's conflicting interest transaction, and (ii) the director(s) interested in the transaction. Finally, section 830 compliance may have a direct bearing on a court's analysis where transactional justification (e.g., a suit to enjoin a pending merger) is at issue.

A director complying with the standard of care expressed in subsection (2) is entitled to rely (under subsection (3)) upon board functions performed pursuant to delegated authority by, and to rely (under subsection (4)) upon information, opinions, reports or statements, including financial statements and other financial data, provided by, the persons or committees specified in the relevant parts of subsection (5). Within this authorization, the right to rely applies to the entire range of matters for which the board of directors is responsible. However, a director so relying must be without knowledge that would cause that reliance to be unwarranted. Section 830 expressly prevents a director from "hiding his or her head in the sand" and relying on the delegation of board functions, or on information, opinions reports or statements, when the director has actual knowledge that makes (or has a measure of knowledge that would cause a person, in a like position under similar circumstances, to undertake reasonable inquiry that would lead to information making) reliance unwarranted.

1. SECTION 830(1). Section 830(1) establishes the basic standards of conduct for all directors. Its command is to be understood as peremptory — its obligations are to be observed by every director — and at the core of the subsection's mandate is the requirement that, when performing directors' duties, a director shall act in good faith coupled with conduct reasonably believed to be in the best interests of the corporation. This mandate governs all aspects of directors' duties: the duty of care, the duty to become informed, the duty of inquiry, the duty of informed judgment, the duty of attention, the duty of loyalty, the duty of fair dealing and, finally, the broad concept of fiduciary duty that the courts often use as a frame of reference when evaluating a director's conduct. These duties do not necessarily compartmentalize and, in fact, tend to overlap. For example, the duties of care, inquiry, becoming informed, attention and informed judgment all relate to the board's decision-making function, whereas the duties of attention, becoming informed and inquiry relate to the board's oversight function.

Two of the phrases chosen to specify the manner in which a director's duties are to be discharged deserve further comment:

(1) The phrase "reasonably believes" is both subjective and objective in character. Its first level of analysis is geared to what the particular director, acting in good faith, actually believes — not what objective analysis would lead another director (in a like position and acting in similar circumstances) to conclude. The second level of analysis is focused specifically on "reasonably." While a director has wide discretion in marshalling the evidence and reaching conclusions, whether a director's belief is reasonable (i.e., could — not would — a reasonable person in a like position and acting in similar circumstances have arrived at that belief) ultimately involves an overview that is objective in character.

(2) The phrase "best interests of the corporation" is key to an explication of a director's duties. The term "corporation" is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation's "best interests," the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups within the shareholder body or having other cognizable interests in the enterprise may differ.

As a generalization, section 830 operates as a "baseline" principle governing director conduct "when discharging the [on-going] duties of a director" in circumstances uncomplicated by self-interest taint. The Model Act recognizes, however, that directors' personal interests may not always align with the corporation's best interests and provides procedures by which interest-conflict transactions can be processed. See sections 740 through 747 (derivative proceedings) of part 7 and sections 850 through 859 (indemnification) and sections 860 through 863 (directors' conflicting interest transactions) of this part 8. Those procedures generally contemplate that the interested director will not be involved in taking action on the interest-conflict transaction. And the common law has recognized that other interest-conflict situations may arise which do not entail a "transaction" by or with the corporation (e.g., the corporate opportunity doctrine). The interested director is relieved of the duty to act in connection with the matter on behalf of the corporation (specifically, the traditional mandate to act in the corporation's best interests), given the inherent conflict. However, the interested director is still expected to act in good faith, and that duty is normally discharged by observing the obligation of fair dealing. In the case of interest-conflict transactions, where there is a conflicting interest with respect to the corporation under section 860(1), the interested director's conduct is governed by sections 860 through 863 of this part 8. The duty of fair dealing is embedded in the subsection 860(4) provision calling for the interested director to make the required disclosure as to the conflicting interest and the transaction and, if one of the two safe harbor procedures is not properly observed, the interested director must prove the fairness (i.e., procedure, involving good faith among other aspects, as well as price) of the transaction to the corporation. In other cases, Section 830's standards of conduct are overlaid by various components of the duty to act fairly, the particular thrusts of which will depend upon the kind of interested director's conduct at issue and the circumstances of the case. As a general

rule, the duty of fair dealing is normally discharged by the interested director through appropriate disclosure to the other directors considering the matter followed by abstention from participation in any decision-making relevant thereto. If and to the extent that the interested director's action respecting the matter goes further, the reasonableness of the director's belief as to the corporation's best interests, in respect of the action taken, should be evaluated on the basis of not only the director's honest and good faith belief but also on considerations bearing on the fairness of the transaction or conduct to the corporation.

2. SECTION 830(2). Section 830(2) establishes a general standard of care for directors in the context of their dealing with the board's decision-making and oversight functions. While certain aspects will involve individual conduct (e.g., preparation for meetings), these functions are generally performed by the board through collegial action, as recognized by the reference in subsection (2) to board and committee "members" and "their duties." In contrast with subsection (1)'s individual conduct mandate, section 830(2) has a two-fold thrust: it provides a standard of conduct for individual action and, more broadly, it states a conduct obligation — "shall discharge their duties" — concerning the degree of care to be collegially used by the directors when performing those functions. It provides that directors have a duty to exercise "the care that a person in a like position would reasonably believe appropriate under similar circumstances."

The traditional formulation for a director's standard (or duty) of care has been geared to the "ordinarily prudent person." For example, the Model Act's prior formulation (in former section 830(1)(b)) referred to "the care an ordinarily prudent person in a like position would exercise under similar circumstances," and almost all state statutes that include a standard of care reflect parallel language. The phrase "ordinarily prudent person" constitutes a basic frame of reference grounded in the field of tort law and provides a primary benchmark for determining negligence. For this reason, its use in the standard of care for directors, suggesting that negligence is the proper determinant for measuring deficient (and thus actionable) conduct, has caused confusion and misunderstanding. Accordingly, the phrase "ordinarily prudent person" has been removed from the Model Act's standard of care and in its place "a person in a like position" has been substituted. The standard is not what care a particular director might believe appropriate in the circumstances but what a person — in a like position and acting under similar circumstances — would reasonably believe to be appropriate. Thus, the degree of care that directors should employ, under subsection (2), involves an objective standard.

Some state statutes have used the words "diligence," "care," and "skill" to define the duty of care. There is very little authority as to what "skill" and "diligence," as distinguished from "care," can be required or properly expected of corporate directors in the performance of their duties. "Skill," in the sense of technical competence in a particular field, should not be a qualification for the office of director. The concept of "diligence" is sufficiently subsumed within the concept of "care." Accordingly, the words "diligence" and "skill" are not used in section 830's standard of care.

The process by which a director becomes informed, in carrying out the decision-making and oversight functions, will vary. Relevant thereto, the directors' decision-making function is established in large part by various sections of the Act: the issuance of shares (621); distributions (640); dismissal of derivative proceedings (744); indemnification (855); interested-transaction authorization (862); articles of incorporation amendments (1002 and 1003); bylaw amendments (1020); mergers (1101); share exchanges (1102); asset sales and mortgages (1201 and 1202); and dissolution (1402). In contrast, the Act does not deal directly with the directors' oversight function. That function is established indirectly by section 801(2)'s broad provision making the board responsible for the exercise of corporate powers and the direction of how the corporation's business and affairs are managed. In relying on the performance by management of delegated or assigned section 801 duties (including, for example, matters of law and legal compliance), as authorized by subsection (3), directors may depend upon the presumption of regularity absent knowledge or notice to the contrary. In discharging the section 801 duties associated with the board's oversight function, the standard of care entails primarily a duty of attention. In contrast with the board's decision-making function, which generally involves informed action at a point in time, the oversight function is concerned with a continuum and the duty of attention accordingly involves participatory performance over a period of time.

Several of the phrases chosen to define the standard of conduct in section 830(2) deserve specific mention:

(1) The phrase "becoming informed," in the context of the decision-making function, refers to the process of gaining sufficient familiarity with the background facts and circumstances in order to make an informed judgment. Unless the circumstances would permit a reasonable director to conclude that he or she is already sufficiently informed, the standard of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. The process typically involves review of written

materials provided before or at the meeting and attention to/participation in the deliberations leading up to a vote. It can involve consideration of information and data generated by persons other than legal counsel, public accountants, etc., retained by the corporation, as contemplated by subsection (5)(b); for example, review of industry studies or research articles prepared by unrelated parties could be very useful. It can also involve direct communications, outside of the boardroom, with members of management or other directors. There is no one way for "becoming informed," and both the method and measure — "how to" and "how much" — are matters of reasonable judgment for the director to exercise.

(2) The phrase "devoting attention," in the context of the oversight function, refers to concern with the corporation's information and reporting systems and not to proactive inquiry searching out system inadequacies or noncompliance. While directors typically give attention to future plans and trends as well as current activities, they should not be expected to anticipate the problems which the corporation may face except in those circumstances where something has occurred to make it obvious to the board that the corporation should be addressing a particular problem. The standard of care associated with the oversight function involves gaining assurances from management and advisers that systems believed appropriate have been established coupled with ongoing monitoring of the systems in place, such as those concerned with legal compliance or internal controls — followed up with a proactive response when alerted to the need for inquiry.

(3) The reference to "person," without embellishment, is intended to avoid implying any qualifications, such as specialized expertise or experience requirements, beyond the basic director attributes of common sense, practical wisdom, and informed judgment.

(4) The phrase "reasonably believe appropriate" refers to the array of possible options that a person possessing the basic director attributes of common sense, practical wisdom and informed judgment would recognize to be available, in terms of the degree of care that might be appropriate, and from which a choice by such person would be made. The measure of care that such person might determine to be appropriate, in a given instance, would normally involve a selection from the range of options and any choice within the realm of reason would be an appropriate decision under the standard of care called for under subsection (2). However, a decision that is so removed from the realm of reason or so unreasonable as to fall outside the permissible bounds of sound discretion, and thus an abuse of discretion, will not satisfy the standard.

(5) The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "person" if he or she were a director of the particular corporation.

(6) The combined phrase "in a like position . . . under similar circumstances" is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the benefit of hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating that director's compliance with the standard of care. Even though the combined phrase is intended to take into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the basic director attributes of common sense, practical wisdom, and informed judgment.(6)

3. SECTION 830(3). The delegation of authority and responsibility under subsection (3) may take the form of (i) formal action through a board resolution, (ii) implicit action through the election of corporate officers (e.g., chief financial officer or controller) or the appointment of corporate managers (e.g., credit manager), or (iii) informal action through a course of conduct (e.g., involvement through corporate officers and managers in the management of a significant 50%-owned joint venture). A director may properly rely on those to whom authority has been delegated pursuant to subsection (3) respecting particular matters calling for specific action or attention in connection with the directors' decision-making function as well as matters on the board's continuing agenda, such as legal compliance and internal control, in connection with the directors' oversight function. Delegation should be carried out in accordance with the standard of care set forth in section 830(2).

By identifying those upon whom a director may rely in connection with the discharge of duties, section 830(3) does not limit the ability of directors to delegate their powers under section 801(2) except where delegation is expressly prohibited by the Act or otherwise by applicable law (see, e.g., section 825(5) and § 11 of the Securities Act of 1933). See section 825 and its Official Comment for detailed consideration of delegation to board committees of the authority of the board under section 801 and the duty to perform one or more of the board's functions. And by employing the concept of delegation, section 830(3) does not limit the ability of directors to establish baseline principles as to management responsibilities. Specifically,

section 801(2) provides that "all corporate powers shall be exercised by or under the authority of" the board, and a basic board function involves the allocation of management responsibilities and the related assignment (or delegation) of corporate powers. For example, a board can properly decide to retain a third party to assume responsibility for the administration of designated aspects of risk management for the corporation (e.g., health insurance or disability claims). This would involve the directors in the exercise of judgment in connection with the decision-making function pursuant to subsection (2) (i.e., the assignment of authority to exercise corporate powers to an agent). See the Official Comment to section 801. It would not entail impermissible delegation — to a person specified in subsection (5)(b) pursuant to subsection (3) — of a board function for which the directors by law have a duty to perform. They have the corporate power (under section 801(2)) to perform the task but administration of risk management is not a board function coming within the ambit of directors' duties; together with many similar management responsibilities, they may assign the task in the context of the allocation of corporate powers exercised under the authority of the board. This illustration highlights the distinction between delegation of a board function and assignment of authority to exercise corporate powers.

Although the board may delegate the authority or duty to perform one or more of its functions, reliance on delegation under subsection (3) may not alone constitute compliance with section 830 and reliance on the action taken by the delegatee may not alone constitute compliance by the directors or a noncommittee board member with section 801 responsibilities. On the other hand, should the board committee or the corporate officer or employee performing the function delegated fail to meet section 830's standard of care, noncompliance by the board with section 801 will not automatically result. Factors to be considered, in this regard, will include the care used in the delegation to and supervision over the delegatee, and the amount of knowledge regarding the particular matter which is available to the particular director. Care in delegation and supervision includes appraisal of the capabilities and diligence of the delegatee in light of the subject and its relative importance and may be facilitated, in the usual case, by receipt of reports concerning the delegatee's activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and avoid accountability simply by delegating authority to others. Rather, a director charged with accountability based upon acts of others will fulfill the director's duties if the standards contained in section 830 are met.

4. SECTION 830(4). Reliance under subsection (4) on a report, statement, opinion, or other information is permitted only if the director has read the information, opinion, report or statement in question, or was present at a meeting at which it was orally presented, or took other steps to become generally familiar with it. A director must comply with the general standard of care of section 830(2) in making a judgment as to the reliability and competence of the source of information upon which the director proposes to rely or, as appropriate, that it otherwise merits confidence.

5. SECTION 830(5). Reliance on one or more of the corporation's officers or employees, pursuant to the intracorporate frame of reference of subsection (5)(a), is conditioned upon a reasonable belief as to the reliability and competence of those who have undertaken the functions performed or who prepared or communicated the information, opinions, reports or statements presented. In determining whether a person is "reliable," the director would typically consider (i) the individual's background experience and scope of responsibility within the corporation in gauging the individual's familiarity and knowledge respecting the subject matter and (ii) the individual's record and reputation for honesty, care and ability in discharging responsibilities which he or she undertakes. In determining whether a person is "competent," the director would normally take into account the same considerations and, if expertise should be relevant, the director would consider the individual's technical skills as well. Recognition in the statute of the right of one director to rely on the expertise and experience of another director, in the context of board or committee deliberations, is unnecessary, for the group's reliance on shared experience and wisdom is an implicit underpinning of director conduct. In relying on another member of the board, a director would quite properly take advantage of the colleague's knowledge and experience in becoming informed about the matter at hand before taking action; however, the director would be expected to exercise independent judgment when it comes time to vote.

Subsection (5)(b), which has an extra corporate frame of reference, permits reliance on outside advisers retained by the corporation, including persons specifically engaged to advise the board or a board committee. Possible advisers include not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers. The adviser could be an individual or an organization, such as a law firm. Reliance on a

nonmanagement director, who is specifically engaged (and, normally, additionally compensated) to undertake a special assignment or a particular consulting role, would fall within this outside adviser frame of reference. The concept of "expert competence" embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933. In this respect, subsection (5)(b) goes beyond the reliance provision found in many existing state business corporation acts. In addition, a director may also rely on outside advisers where skills or expertise of a technical nature is not a prerequisite, or where the person's professional or expert competence has not been established, so long as the director reasonably believes the person merits confidence. For example, a board might choose to assign to a private investigator the duty of inquiry (e.g., follow up on rumors about a senior executive's "grand lifestyle") and properly rely on the private investigator's report. And it would be entirely appropriate for a director to rely on advice concerning highly technical aspects of environmental compliance from a corporate lawyer in the corporation's outside law firm, without due inquiry concerning that particular lawyer's technical competence, where the director reasonably believes the lawyer giving the advice is appropriately informed — by reason of resources known to be available from that adviser's legal organization or through other means — and therefore merits confidence.

Subsection (5)(c) permits reliance on a board committee when it is submitting recommendations for action by the full board of directors as well as when it is performing supervisory or other functions in instances where neither the full board of directors nor the committee takes dispositive action. For example, the compensation committee typically reviews proposals and makes recommendations for action by the full board of directors. In contrast, there may be reliance upon an investigation undertaken by a board committee and reported to the full board, which forms the basis for a decision by the board of directors not to take dispositive action. Another example is reliance on a committee of the board of directors, such as a corporate audit committee, with respect to the board's ongoing role of oversight of the accounting and auditing functions of the corporation. In addition, where reliance on information or materials prepared or presented by a board committee is not involved, in connection with board action, a director may properly rely on oversight monitoring or dispositive action by a board committee (of which the director is not a member) empowered to act pursuant to authority delegated under section 825 or acting with the acquiescence of the board of directors. See the Official Comment to section 825. A director may similarly rely on committees not created under section 825 which have nondirector members. In parallel with subsection (5)(b)(ii), the concept of "confidence" is substituted for "competence" in order to avoid any inference that technical skills are a prerequisite. In the usual case, the appointment of committee members or the reconstitution of the membership of a standing committee (e.g., the audit committee), following an annual shareholders' meeting, would alone manifest the noncommittee members' belief that the committee "merits confidence." However, the reliance contemplated by subsection (5)(c) is geared to the point in time when the board takes action or the period of time over which a committee is engaged in an oversight function; consequently, the judgment to be made (i.e., whether a committee "merits confidence") will arise at varying points in time. After making an initial judgment that a committee (of which a director is not a member) merits confidence, the director may depend upon the presumption of regularity absent knowledge or notice to the contrary.

6. APPLICATION TO OFFICERS. Section 830 generally deals only with directors. Section 842 and its Official Comment explain the extent to which the provisions of section 830 apply to officers.

IDAHO REPORTER'S COMMENT

Section 830 was very substantially amended in 2004 and is now a more comprehensive description of expected director *conduct* than was pre-existing I.C. § 30-830. General director *liability* is separately treated in new § 831 (no pre-existing Idaho counterpart). Most generally, § 830 is designed to instruct the ways directors discharge their § 8.01 and other duties. The 2004 amendments emphasize the distinction between standards of conduct (§ 830) and standards of liability (§ 831).

Subsection (1) sets forth the basic, general standard of conduct for directors in discharging all their duties. The old subsection (1) language "ordinarily prudent person" was replaced because of the impression it gave some that it was establishing a negligence test for director liability. This caused some confusion vis-a-vis the "business judgment rule." See your reporter's comment to the new section 831, below.

A question has been raised as to whether the subsection (1) reference to "the best interests of the corporation" includes constituencies in addition to shareholders. According to the ABA's

2004 *Model Business Corporation Act Annotated*, "Thirty states [including Idaho] have broadened the permissible scope of directors' discretion by authorizing them to consider, in addition to the interests of the corporation and its shareholders, the effect of board action or failure to act on the interests of 'other constituencies'" (Vol. 2, pp. 8-179 & 8-180). I.C. §§ 30-1-1602 and 1702 are curiously cited. These Idaho sections deal with inspection of records by shareholders and application to qualified foreign corporations, respectively. The correct references would be to I.C. §§ 30-1602 and 30-1702, which describe the duties of directors in the limited contexts of the Control Share Acquisitions Act and the Business Combination Act. The Model Annotation does indicate that "Nine [of the thirty] states' statutes apply only to decisions involving a change or potential change in control...." It appears that the Annotation simply missed Idaho in this respect. The "other constituencies" recognized elsewhere have included employees, customers, suppliers, creditors, community, the economy and the like. In view of Enron and the 2004 "climate" of corporate and accounting scandal, the Idaho Bar Committee discussed this matter of specifically including other constituencies as being of appropriate concern in director decision-making and other conduct. The Committee concluded that any director consideration of such other constituencies should remain limited, as under present Idaho law, to the takeover context; and the directors should not be either authorized or required to consider such other interests in their management and direction of an Idaho corporation in the ordinary course of business. The Committee believed that mandating or authorizing consideration of such other constituencies in normal circumstances would not serve the interests of the corporation's owners and would potentially subject directors to suit by a wide population of persons potentially affected by a board's decisions, such as layoffs during tight economic times. In addition, the Committee was concerned that director and officer liability insurance covering such expanded exposure to suits and liabilities would be unavailable or unavailable at reasonable cost.

In view of the foregoing, this comment expressly negates any inference from the Model Act drafter's comment or their miscitation of the Idaho Code that directors of Idaho corporations owe fiduciary duties of care to constituencies other than the shareholders or that such directors are authorized to consider such other constituencies except in the limited context of takeovers or business combinations under the Control Share Acquisition Act or the Business Combination Act.

Subsection (2) changed the description of the standard of care in the specific contexts of "decision-making" and "oversight" to again deal with the tort law/negligence standard confusion discussed above. The new "reasonably believes appropriate" standard appears to apply to individual directors in the collegial contexts of decision-making and oversight. It appears that subsection (1) applies outside these two specific contexts.

Subsections (3), (4) and (5) deal with delegation and reliance in greater detail than did old section 830.

30-1-831. Standards of liability for directors. — (1) A director shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

(a) Any provision in the articles of incorporation authorized by section 30-1-202(2)(d), Idaho Code, or the protection afforded by section 30-1-861, Idaho Code, for action taken in compliance with section 30-1-862 or 30-1-863, Idaho Code, if interposed as a bar to the proceeding by the director, does not preclude liability; and

(b) The challenged conduct consisted or was the result of:

(i) Action not in good faith; or

(ii) A decision:

(A) Which the director did not reasonably believe to be in the best interests of the corporation; or

(B) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(iii) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the

director's domination or control by, another person having a material interest in the challenged conduct:

(A) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

(B) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation; or

(iv) A sustained failure of the director to be informed about the business and affairs of the corporation, or other material failure of the director to discharge the oversight function; or

(v) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

(2) The party seeking to hold the director liable:

(a) For money damages, shall also have the burden of establishing that:

(i) Harm to the corporation or its shareholders has been suffered; and

(ii) The harm suffered was proximately caused by the director's challenged conduct; or

(b) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(c) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, shall also have whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(3) Nothing contained in this section shall:

(a) In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under section 30-1-861(2) (c), Idaho Code, alter the burden of proving the fact or lack of fairness otherwise applicable;

(b) Alter the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under section 30-1-833, Idaho Code, or a transactional interest under section 30-1-861, Idaho Code; or

(c) Affect any rights to which the corporation or a shareholder may be entitled under another statute of this state or the United States.

History.

I.C. § 30-1-831, as added by 2004, ch. 324, § 23, p. 907.

ABA OFFICIAL COMMENT

Subsections (1) and (2) of section 830 establish standards of conduct that are central to the role of directors. Section 830(2)'s standard of conduct is frequently referred to as a director's duty of care. The employment of the concept of "care," if considered in the abstract, suggests a

tort-law/negligence-based analysis looking toward a finding of fault and damage recovery where the duty of care has not been properly observed and loss has been suffered. But the Model Act's desired level of director performance, with its objectively-based standard of conduct ("the care that a person in a like position would reasonably believe appropriate under similar circumstances"), does not carry with it the same type of result-oriented liability analysis. The courts recognize that boards of directors and corporate managers make numerous decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to be unwise or the result of a mistake of judgment, it is not reasonable to reexamine an unsuccessful decision with the benefit of hindsight. As observed in *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982): "Whereas an automobile driver who makes a mistake in judgment as to speed or distance injuring a pedestrian will likely be called upon to respond in damages, a corporate [director or] officer who makes a mistake in judgment as to economic conditions, consumer tastes or production line efficiency will rarely, if ever, be found liable for damages suffered by the corporation." Therefore, as a general rule, a director is not exposed to personal liability for injury or damage caused by an unwise decision. While a director is not personally responsible for unwise decisions or mistakes of judgment — and conduct conforming with the standards of section 830 will almost always be protected — a director can be held liable for misfeasance or nonfeasance in performing the duties of a director. And while a director whose performance meets the standards of section 830 should have no liability, the fact that a director's performance fails to reach that level does not automatically establish personal liability for damages that the corporation may have suffered as a consequence.

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NOTE ON DIRECTORS' LIABILITY. A director's financial risk exposure (e.g., in a lawsuit for money damages suffered by the corporation or its shareholders claimed to have resulted from misfeasance or nonfeasance in connection with the performance of the director's duties) can be analyzed as follows:

1. *Articles of incorporation limitation.* If the corporation's articles of incorporation contain a provision eliminating its directors' liability to the corporation or its shareholders for money damages, adopted pursuant to section 202(2)(d), there is no liability unless the director's conduct involves one of the prescribed exceptions that preclude the elimination of liability. See section 202 and its Official Comment.

2. *Director's conflicting interest transaction safe harbor.* If the matter at issue involves a director's conflicting interest transaction (as defined in section 860(2)) and a safe harbor procedure under section 861 involving action taken in compliance with section 862 or 863 has been properly implemented, there is no liability for the interested director arising out of the transaction. See sections 860 through 863 of this part 8.

3. *Business judgment rule.* If an articles of incorporation provision adopted pursuant to section 202 or a safe harbor procedure under section 861 does not shield the director's conduct from liability, this standard of judicial review for director conduct — deeply rooted in the case law — presumes that, absent self-dealing or other breach of the duty of loyalty, directors' decision-making satisfies the applicable legal requirements. A plaintiff challenging the director's conduct in connection with a corporate decision, and asserting liability by reason thereof, encounters certain procedural bathers. In the first instance, many jurisdictions have special pleading requirements that condition the ability to pursue the challenge on the plaintiff's bringing forward specific factual allegations that put in question the availability of the business judgment presumption. Assuming the suit survives a motion to dismiss for failure to state (in satisfaction of such a condition) an actionable claim, the plaintiff has the burden of overcoming that presumption of regularity.

4. *Damages and proximate cause.* If the business judgment rule does not shield the directors' decision-making from liability, as a general rule it must be established that money damages were suffered by the corporation or its shareholders and those damages resulted from and were legally caused by the challenged act or omission of the director.

5. *Other liability for money payment.* Aside from a claim for damages, the director may be liable to reimburse the corporation pursuant to a claim under *quantum meruit* (the reasonable value of services) or *quantum valebant* (the reasonable value of goods and materials) if corporate resources have been used without proper authorization. In addition, the corporation may be entitled to short-swing profit recovery, stemming from the director's trading in its securities, under § 16(b) of the Securities Exchange Act of 1934.

6. *Equitable profit recovery or disgorgement.* An equitable remedy compelling the disgorgement of the director's improper financial gain or entitling the corporation to profit recovery, where directors' duties have been breached, may require the payment of money by the director to the corporation.

7. *Corporate indemnification.* If the court determines that the director is liable, the director may be indemnified by the corporation for any payments made and expenses incurred, depending upon the circumstances, if a third-party suit is involved. If the proceeding is by or in the right of the corporation, the director may be reimbursed for reasonable expenses incurred in connection with the proceeding if ordered by a court under section 854(1)(c).

8. *Insurance.* To the extent that corporate indemnification is not available, the director may be reimbursed for the money damages for which the director is accountable, together with proceeding-related expenses, if the claim/grounds for liability come within the coverage under directors' and officers' liability insurance that has been purchased by the corporation pursuant to section 857.

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Section 831 includes steps (1) through (6) in the analysis of a director's liability exposure set forth in the above Note. In establishing general standards of director liability under the Model Act, the section also serves the important purpose of providing clarification that the general standards of conduct set forth in section 830 are not intended to codify the business judgment rule a point as to which there has been confusion on the part of some courts (notwithstanding a disclaimer of that purpose and effect in the prior Official Comment to section 830). For example, one court viewed the standard of care set forth in Washington's business corporation act (a provision based upon and almost identical to the prior section 830(1) — which read "A director shall discharge his duties as a director . . . [(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation"]) as having codified the business judgment rule. See *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1152, 1159 (W.D. Wash. 1986). (A later court characterized this view as a mistaken assumption and recognized the disclaimer made in section 830's Official Comment. See *Shinn v. Thrust IV Inc.*, 786 P. 2d 285, 290 n.1 (Wash. App. 1990).) Another court declared "Section 309 [a standard of conduct almost identical to the prior section 8.30(a)] codifies California's business judgment rule." See *Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250, 1264 (1989). The Court of Appeals of New York referred to that state's statutory standard of care for directors, a formulation set forth in NYBCL § 717 that is similar to the prior section 830(1), as "New York's business judgment rule." See *Lindner Fund, Inc. v. Waldbaum, Inc.*, 624 N.E. 2d 160, 161 (1993). In contrast, another court considering New York's conduct standard observed:

> A board member's obligation to a corporation and its shareholders has two prongs, generally characterized as the duty of care and the duty of loyalty. The duty of care refers to the responsibility of a corporate fiduciary to exercise, in the performance of his tasks, the care that a reasonably prudent person in a similar position would use under similar circumstances. See NYBCL § 717. In evaluating a manager's compliance with the duty of care, New York courts adhere to the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."

Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir. 1984) [quoting *Auerbach v. Bennett*, 47 N.Y. 2d 619, 629 (1979)].

Sections 830 and 831 adopt the approach to director conduct and director liability taken in the Norlin decision. See section 830 and its Official Comment with respect to the standards of conduct for directors. For a detailed analysis of how and why standards of conduct and standards of liability diverge in corporate law, see Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 Fordham L. Rev. 437 (1993).

The Model Act does not undertake to prescribe detailed litigation procedures. However, it does deal with requirements applicable to shareholder derivative suits (see sections 740-747) and section 831 builds on those requirements. If either a liability-eliminating provision included in the corporation's articles of incorporation, pursuant to section 202(2)(d), or protection for a director's conflicting interest transaction afforded by section 861(2)(a) or section 861(2)(b), is interposed by a defendant director as a bar to the challenge of his or her conduct, the plaintiff's role in satisfying the requirement of subsection (1)(a) — i.e., establishing that the articles of incorporation provision or the safe harbor provision interposed does not apply — would be governed by the court's procedural rules. Parenthetically, where fairness of a director's conflicting interest transaction can be established, protection from liability is also afforded by section 861(2)(c). If it is asserted by a defendant director as a defense, it is important to note that subsection (1)(b)(v) rather than subsection (1)(a) would be implicated and the burden of establishing that the transaction was fair to the corporation — and, therefore, no improper financial benefit was received — is placed on the interested director under section 861(2)(c). Similarly, the local pleading and other rules would govern the plaintiffs

effort to satisfy subsection (1)(b)'s requirements. Consistent with the general rules of civil procedure, the plaintiff generally has the burden under subsection (2) of proving that the director's deficient conduct caused harm resulting in monetary damage or calls for monetary reimbursement; in the alternative, the circumstances may justify or require an equitable remedy.

1. SECTION 831(1). If a provision in the corporation's articles of incorporation (adopted pursuant to section 202(2)(d)) shelters the director from liability for money damages, or if a safe harbor provision, under subsection (2)(a) or (2)(b) of section 861, shelters the director's conduct in connection with a conflicting interest transaction, there is no need to consider further the application of section 831's standards of liability. In either case, the court would presumably grant the defendant director's motion for dismissal or summary judgment (or the equivalent) and the proceeding would be ended. Termination of the proceeding will not automatically follow, however, if the party challenging the director's conduct can assert any of the valid bases for contesting the availability of the liability shelter. In the absence thereof, the relevant shelter provision is self-executing and the individual director's exoneration from liability is automatic. Further, if the shelter provision is section 861(2)(a)'s safe harbor, the directors approving the conflicting interest transaction will presumably be protected as well, for compliance with the relevant standards of conduct under section 830 is important for their action to be effective and, as noted above, conduct meeting section 830's standards will almost always be protected.

If a claim of liability arising out of a challenged act or omission of a director is not resolved and disposed of under subsection (1)(a), subsection (1)(b) provides the basis for evaluating whether the conduct in question can be challenged.

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NOTE ON THE BUSINESS JUDGMENT RULE. Over the years, the courts have developed a broad common law concept geared to business judgment. In basic principle, a board of directors enjoys a presumption of sound business judgment and its decisions will not be disturbed (by a court substituting its own notions of what is or is not sound business judgment) if they can be attributed to any rational business purpose. See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Relatedly, it is presumed that, in making a business decision, directors act in good faith, on an informed basis, and in the honest belief that the action taken is in the best interests of the corporation. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1983). When applied, this principle operates both as a procedural rule of evidence and a substantive rule of law, in that if the plaintiff fails to rebut the presumption that the directors acted in good faith, in the corporation's best interest and on an informed basis, the business judgment standard protects both the directors and the decisions they make. See *Citron v. Fairchild Camera & Instrument Corp.*, 569 A. 2d 53, 64 (Del. 1989)

Some have suggested that, within the business judgment standard's broad ambit, a distinction might usefully be drawn between that part which protects directors from personal liability for the decision they make and the part which protects the decision itself from attack. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A. 2d 173, 180 n.10 (Del. 1986). While these two objects of the business judgment standard's protection are different, and judicial review might result in the decision being enjoined but no personal liability (or vice versa), their operative elements are identical (i.e., good faith, disinterest, informed judgment and "best interests"). As a consequence, the courts have not observed any distinction in terminology and have generally followed the practice of referring only to the business judgment rule, whether dealing with personal liability issues or transactional justification matters.

While, in substance, the operative elements of the standard of judicial review commonly referred to as the business judgment rule have been widely recognized, courts have used a number of different word formulations to articulate the concept. The formulation adopted in § 4.01(c) of The American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (1994) provides that a director who makes a business judgment in good faith (an obvious prerequisite) fulfills the duty of care standard if the director:

(1) is not interested [as defined] in the subject of the business judgment;

(2) is informed with respect to the subject of the business judgment to the extent the director . . . reasonably believes to be appropriate under the circumstances; and

(3) rationally believes that the business judgment is in the best interests of the corporation.

Referring to clause (2) above, the decision-making process is to be reviewed on a basis that is to a large extent individualized in nature ("informed ... to the extent the director . . . reasonably believes to be appropriate under the circumstances") — as contrasted with the traditional objectively-based duty-of-care standard (e.g., the prior section 830(1)'s "care ... an ordinarily prudent person . . . would exercise"). An "ordinarily prudent person" might do more to become better informed, but if a director believes, in good faith, that the director can make

a sufficiently informed business judgment, the director will be protected so long as that belief is within the bounds of reason. Referring to clause (3) above, the phrase "rationally believes" is stated in the Principles to be a term having "both an objective and subjective content. A director ... must actually believe that the business judgment is in the best interests of the corporation and that belief must be rational," 1 Principles, at 179. Others see that aspect to be primarily geared to the process employed by a director in making the decision as opposed to the substantive content of the board decision made. See Aronson v. Lewis, supra, at 812 ("The business judgment rule is ... a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.... Absent an abuse of discretion, that judgment will be respected by the courts.") In practical application, an irrational belief would in all likelihood constitute an abuse of discretion. Compare *In re Caremark International Inc. Derivative Litigation* (September 25, 1996) (1996 Del. Ch. LEXIS 125 at p. 27: "whether a judge or jury considering the matter after the fact . . . believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational', provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests . . . the business judgment rule is process oriented and informed by a deep respect for all good faith board decisions.")

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Section 831 does not codify the business judgment rule as a whole. The section recognizes the common law doctrine and provides guidance as to its application in dealing with director liability claims. Because the elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts, it would not be desirable to freeze the concept in a statute. For example, in recent years the Delaware Supreme Court has established novel applications of the concept to various transactional justification matters, such as the role of special litigation committees and change-of-control situations. See *Zapata Corporation v. Maldonado*, 430 A. 2d 779 (1981), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946 (1985), respectively. Under *Zapata*, a rule that applies where there is no disinterested majority on the board appointing the special litigation committee, there is no presumption of regularity and the corporation must bear the burden of proving the independence of the committee, the reasonableness of its investigation, and the reasonableness of the bases of its determination that dismissal of the derivative litigation is in the best interests of the corporation. Under *Unocal*, the board must first establish reasonable grounds for believing an unsolicited takeover bid poses a danger to corporate policy and effectiveness, and a reasonable relationship of defensive measures taken to the threat posed, before the board's action will be entitled to the business judgment presumptions. The business judgment concept has been employed in countless legal decisions and is a topic that has received a great deal of scholarly attention. For an exhaustive treatment of the subject, see D. Block, N. Barton & S. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* (4th ed. 1993 & Supp. 1995). While codification of the business judgment rule in section 831 is expressly disclaimed, its principal elements, relating to personal liability issues, are embedded in subsection (1)(b).

a. Good faith. The expectation that a director's conduct will be in good faith is an overarching element of his or her baseline duties. Relevant thereto, it has been stated that a lack of good faith is presented where a board "lacked an actual intention to advance corporate welfare" and "bad faith" is presented where "a transaction ... is authorized for some purpose other than a genuine attempt to advance corporate welfare or is known to constitute a violation of applicable positive law." See *Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049 (Del. Ch. 1996). If a director's conduct can be successfully challenged pursuant to other clauses of subsection (1)(b), there is a substantial likelihood that the conduct in question will also present an issue of good faith implicating clause (b)(i). Conduct involving knowingly illegal conduct that exposes the corporation to harm will constitute action not in good faith, and belief that decisions made (in connection with such conduct) were in the best interests of the corporation will be subject to challenge as well. If subsection (1)(b) included only clause (b)(i), much of the conduct with which the other clauses are concerned could still be considered pursuant to the subsection, on the basis that such conduct evidenced the actor's lack of good faith. Accordingly, the canon of construction known as *eiusdem generic* has substantial relevance in understanding the broad overlap of the good faith element with the various other subsection (1)(b) clauses. Where conduct has not been found deficient on other grounds, decision-making outside the bounds of reasonable judgment — an abuse of discretion perhaps explicable on no other basis — can give rise to an inference of bad faith. That form of conduct (characterized by the court as "constructive fraud" or "reckless indifference" or "deliberate disregard" in the relatively few case precedents) giving rise to an inference of bad faith will also raise a serious question whether the director could have reasonably believed that the best interests of the corporation

would be served. If a director's conflicting interest transaction is determined to be manifestly unfavorable to the corporation, giving rise to an inference of bad faith tainting the directors' action approving the transaction under section 862, the safe harbor protection afforded by section 861 for both the transaction and the conflicted director would be in jeopardy. See the Official Comment to section 861. Depending on the facts and circumstances, the directors who approve a director's conflicting interest transaction that is manifestly unfavorable to the corporation may be at risk under clause (b)(i).

b. Reasonable belief. A director should reasonably believe that his or her decision will be in the best interests of the corporation and a director should become sufficiently informed, with respect to any action taken or not taken, to the extent he or she reasonably believes appropriate in the circumstances. In each case, the director's reasonable belief calls for a subjective belief and, so long as it is his or her honest and good faith belief, a director has wide discretion. However, in the rare case where a decision respecting the corporation's best interests is so removed from the realm of reason (e.g., corporate waste), or a belief as to the sufficiency of the director's preparation to make an informed judgment is so unreasonable as to fall outside the permissible bounds of sound discretion (e.g., a clear case is presented if the director has undertaken no preparation and is woefully uninformed), the director's judgment will not be sustained.

c. Lack of objectivity or independence. If a director has a familial, financial or business relationship with another person having a material interest in a transaction or other conduct involving the corporation, or if the director is dominated or controlled by another person having such a material interest, there is a potential for that conflicted interest or divided loyalty to affect the director's judgment. If the matter at issue involves a director's transactional interest, such as a "director's conflicting interest transaction" (see section 860(2)) in which a "related person" (see section 860(3)) is involved, it will be governed by section 861; otherwise, the lack of objectivity due to a relationship's influence on the director's judgment will be evaluated, in the context of the pending conduct challenge, under section 831. If the matter at issue involves lack of independence, the proof of domination or control and its influence on the director's judgment will typically entail different (and perhaps more convincing) evidence than what may be involved in a lack of objectivity case. The variables are manifold, and the facts must be sorted out and weighed on a case-by-case basis. If that other person is the director's spouse or employer, the concern that the director's judgment might be improperly influenced would be substantially greater than if that person is the spouse of the director's step-grandchild or the director's partner in a vacation time-share. When the party challenging the director's conduct can establish that the relationship or the domination or control in question could reasonably be expected to affect the director's judgment respecting the matter at issue in a manner adverse to the corporation, the director will then have the opportunity to establish that the action taken by him or her was reasonably believed to be in the best interests of the corporation. The reasonableness of the director's belief as to the corporation's best interests, in respect of the action taken, should be evaluated on the basis of not only the director's honest and good faith belief but also on considerations bearing on the fairness to the corporation of the transaction or other conduct involving the corporation that is at issue.

d. Improper financial benefit. Sections 860 through 863 of part 8 deal in detail with directors' transactional interests. Its coverage of those interests is exclusive and its safe harbor procedures for directors' conflicting interest transactions (as defined) — providing shelter from legal challenges based on interest conflicts, when properly observed — will establish a director's entitlement to any financial benefit gained from the transactional event. A director's conflicting interest transaction that is not protected by the fairness standard set forth in section 861(2)(c), pursuant to which the conflicted director may establish the transaction to have been fair to the corporation, would often involve receipt of a financial benefit to which the director was not entitled (i.e., the transaction was not "fair" to the corporation). Unauthorized use of corporate assets, such as aircraft or hotel suites, would also provide a basis for the proper challenge of a director's conduct. There can be other forms of improper financial benefit not involving a transaction with the corporation or use of its facilities, such as where a director profits from unauthorized use of proprietary information.

e. Financial benefit/material interest. A director is expected to observe an obligation of undivided loyalty to the corporation and, while the law will not concern itself with trifling deviations (*de minimis non curat lex*), there is no materiality threshold that applies to a financial benefit to which a director is not properly entitled. The Model Act observes this principle in several places (e.g., the exception to liability elimination prescribed in section 202(2)(d)(A) and the indemnification restriction in section 851(4)(b), as well as the liability standard in subsection (1)(b)(v)). In contrast, there is a materiality threshold for the interest of another in a transaction or conduct where a director's lack of objectivity or lack of independence has been asserted under subsection (1)(b)(iii). In the typical case, analysis of another's interest

would first consider the materiality of the transaction or conduct at issue — in most cases, any transaction or other action involving the attention of the board or one of its committees will cross the materiality threshold, but not always — and would then consider the materiality of that person's interest therein. The possibility that another's interest in a transaction or conduct that is not material, or that an immaterial interest of another in a transaction or conduct, would adversely affect a director's judgment is sufficiently remote that it should not be made subject to judicial review.

f. Sustained inattention. The director's role involves two fundamental components: the decision-making function and the oversight function. In contrast with the decision-making function, which generally involves action taken at a point in time, the oversight function under section 801(2) involves ongoing monitoring of the corporation's business and affairs over a period of time. This involves the duty of ongoing attention, when actual knowledge of particular facts and circumstances arouse suspicions which indicate a need to make inquiry. As observed by the Supreme Court of New Jersey in *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (Sup. Ct. 1981):

> Directors are under a continuing obligation to keep informed about the activities of the corporation.... Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect.... Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies.

While the facts will be outcome-determinative, deficient conduct involving a sustained failure to exercise oversight — where found actionable — has typically been characterized by the courts in terms of abdication and continued neglect of a director's duty of attention, not a brief distraction or temporary interruption. However, embedded in the oversight function is the need to inquire when suspicions are aroused. This duty is not a component of ongoing oversight, and does not entail proactive vigilance, but arises when, and only when, particular facts and circumstances of material concern (e.g., evidence of embezzlement at a high level or the discovery of significant inventory shortages) suddenly surface.

g. Other breaches of a director's duties. Subsection (1)(b)(v) is, in part, a catchall provision that implements the intention to make section 831 a generally inclusive provision but, at the same time, to recognize the existence of other breaches of common-law duties that can give rise to liability for directors. A doctrine of corporate governance, well-established in the case law, is that a director owes a duty of loyalty to the corporation; relatedly, the courts impose a duty of fair dealing on directors when their conduct affects the interests of the corporation. It has long been recognized that a director must first offer a "corporate opportunity" to the corporation before taking advantage of it. The term "corporate opportunity" can be readily stated in principle but, when determining the doctrine's application, the facts will often be outcome-determinative. It has been defined in § 505(2)(a) of The American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (1994) to mean, insofar as a director is concerned:

> Any opportunity to engage in a business activity of which a director . . . becomes aware, either:
>
> (A) In connection with the performance of functions as a director . . . , or under circumstances that should reasonably lead the director . . . to believe that the person offering the opportunity expects it to be offered to the corporation; or
>
> (B) Through the use of corporate information or property, if the resulting opportunity is one that the director . . . should reasonably be expected to believe would be of interest to the corporation.

The application of the corporate opportunity doctrine, in cases where it is operative, is typically conditioned on the corporation's financial ability to exploit the opportunity, although some courts have held it is up to the corporation to judge that ability and the opportunity should therefore always be offered. Relatedly, a formal offer is not essential, so long as the surrounding circumstances indicate an awareness of, and afford the corporation reasonable access to, the opportunity and there is indicated disinterest, manifested by inaction or due to financial inability. See *Broz v. Cellular Information Systems, Inc.*, 673 A.2d 148 (Del. 1996). Failure to observe this obligation first to refer a corporate opportunity to the corporation results in a breach of a director's duty. A related duty obligates the director to refrain from gaining a pecuniary benefit by engaging in competition with the corporation that would cause reasonably foreseeable harm to it; unless authorized by the corporation, that conduct will constitute a breach of the director's duties.

h. Fairness. Pursuant to section 861(2)(c), an interested director (or the corporation, if it chooses) can gain protection for a director's conflicting interest transaction by establishing that it was fair to the corporation. (The concept of "fair" and "fairness," in this and various other

contexts, can take into account both fair price and fair dealing on the part of the interested director. See the Official Comment to section 861.) Under case law, personal liability as well as transactional justification issues will be subject to a fairness standard of judicial review if the plaintiff makes out a credible claim of breach of the duty of loyalty or if the presumptions of the business judgment standard (e.g., an informed judgment) are overcome, with the burden of proof shifting from the plaintiff to the defendant. In this respect, the issue of fairness is relevant to both subsection (1) and subsection (2). Within the ambit of subsection (1)(b), a director can often respond to the challenge that his or her conduct was deficient by establishing that the transaction or conduct at issue was fair to the corporation. See *Kahn v. Lynch Communications Systems, Inc.*, 669 A.2d 79 (Del. 1995). Cf. *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345 (Del. 1993) (when the business judgment rule is rebutted — procedurally — the burden shifts to the defendant directors to prove the "entire fairness" of the challenged transaction). It is to be noted, however, that fairness may not be relevant to the matter at issue (see, e.g., clause (iv) of subsection (1)(b)). If the director is successful in establishing fairness, where the issue of fairness is relevant, then it is unlikely that the complainant can establish legal liability or the appropriateness of an equitable remedy under subsection (2).

i. Director conduct. Subsection (1)(b) deals, throughout, with a director's action that is taken or not taken. To the extent that the director's conduct involves a breach of his or her duty of care or duty of attention within the context of collegial action by the board or one of its committees, proper performance of the relevant duty through the action taken by the director's colleagues can overcome the consequences of his or her deficient conduct. For example, where a director's conduct can be challenged under subsection (1)(b)(ii)(B) by reason of having been uninformed about the decision — he or she did not read the merger materials distributed prior to the meeting, arrived late at the board meeting just in time for the vote but, nonetheless, voted for the merger solely because the others were in favor — the favorable action by a quorum of properly informed directors would ordinarily protect the director against liability. When the director's conduct involves the duty of fair dealing within the context of action taken by the board or one of its committees, the wiser choice will usually be for the director not to participate in the collegial action. That is to say, where a director may have a conflicting interest or a divided loyalty, or even where there may be grounds for the issue to be raised, the better course to follow is usually for the director to disclose the conduct-related facts and circumstances posing the possible compromise of his or her independence or objectivity, and then to withdraw from the meeting (or, in the alternative, to abstain from the deliberations and voting). The board members free of any possible taint can then take appropriate action as contemplated by section 830. (If a director's conflicting interest transaction is involved, it will be governed by sections 860 through 863 of this part and the directors' action will be taken pursuant to section 862 (or the board can refer the matter for shareholder's action respecting the transaction under section 863). In this connection, particular reference is made to the definition of "qualified director" in section 862(4).) If this course is followed, the director's conduct respecting the matter in question will in all likelihood be beyond challenge.

2. SECTION 831(2). After satisfying the burden of establishing that the conduct of the director is challengeable under subsection (1), the plaintiff, in order to hold the director liable for money damages under clause (2)(a), has the further burden of establishing that: (i) harm (measurable in money damages) has been suffered by the corporation or its shareholders and (ii) the director's challenged conduct was the proximate cause of that harm. The concept of "proximate cause" is a term of art that is basic to tort law, and the cases providing content to the phrase represent well-developed authority to which a court will undoubtedly refer. A useful approach for the concept's application, for purposes of subsection (2)(a), would be that the challenged conduct must have been a "substantial factor in producing the harm." See *Francis v. United Jersey Bank*, supra, 432 A.2d at 829. Similarly, the plaintiff has the burden of establishing money payment is due from the director pursuant to clause (2)(b). If, while challengeable, the conduct at issue caused no harm under clause (2)(a) or does not provide the basis for other legal remedy under clause (2)(b), but may provide the basis for an equitable remedy under clause (2)(c), the plaintiff must satisfy whatever further burden of persuasion may be indicated to establish that imposition of the remedy sought is appropriate in the circumstances. In *Brophy v. Cities Service Co.*, 70 A.2d 5, 8 (Del. Ch. 1949), an employee was required to account for profits derived from the use of the corporation's confidential plans to reacquire its securities through open-market purchases. Notwithstanding the fact that harm to the corporation had not been established, the Chancellor observed: "[p]ublic policy will not permit an employee occupying a position of trust and confidence toward his employer to abuse that relation to his own profit, regardless of whether his employer suffers a loss." Once actionable conduct that provides the basis for an equitable remedy under clause (2)(c) has been established, its appropriateness will often be clear and, if so, no further advocacy on the part of the plaintiff will be required.

3. SECTION 831(3). While section 831 addresses director liability to the corporation or its shareholders under the Model Act — and related case law dealing with interpretation by the courts of their states' business corporation acts or dealing with corporate governance concepts coming within the common law's ambit — it does not limit any liabilities or foreclose any rights expressly provided for under other law. For example, directors can have liability (i) to shareholders (as well as former shareholders), who purchased their shares in a registered public offering, under § 11 of the Securities Act of 1933 and (ii) to the corporation, for short-swing profit recovery, under § 16(b) of the Securities Exchange Act of 1934. Subsection (3) merely acknowledges that those rights are unaffected by section 831. And directors can have liability to persons other than the corporation and its shareholders, such as (i) employee benefit plan participants and beneficiaries (who may or may not be shareholders), if the directors are determined to be fiduciaries under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992), (ii) government agencies for regulatory violations or (iii) individuals claiming damages for injury governed by tort-law concepts (e.g., libel or slander).

As discussed above in the Official Comment to section 831(1), the concept of "fairness" is often relevant to whether a director will have liability if his or her conduct is challenged. Specifically, a director can successfully defend a financial interest in a transaction with the corporation by establishing that it was fair to the corporation. See section 861 and its Official Comment. More generally, the courts have resorted to a fairness standard of review where the business judgment rule has been inapplicable. See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). In the usual case, the defendant seeking to justify challenged conduct, on the basis of fairness, has the burden of proving that it was fair to the corporation. Subsection (3) expressly disclaims any intention to shift the burden of proof otherwise applicable where the question of the fairness of a transaction or other challenged conduct is at issue.

Finally, the Model Act deals expressly with certain aspects of director liability in other sections. For example, a director has a duty to observe the limitations on shareholder distributions set forth in section 640 and, if a director votes for or assents to a distribution in violation thereof, the director has personal liability as provided in section 833. And section 861 channels all directors' transactional interests into the exclusive treatment for directors' conflicting interest transactions that is therein provided, rejecting an award of damages or other sanctions for interests that do not come within its conceptual framework. Subsection (3) expressly acknowledges that the liability standard provided in section 833 and the exclusive treatment for directors' transactional interests provided in section 861 are unaffected by section 831.

IDAHO REPORTER'S COMMENT

I.C. § 30-1-831 was entirely new to Idaho when enacted in 2004 and when added to the Model Act in 1998 had no counterpart in any state's corporate code. There are a lot of statutes bearing on various aspects of director liability, e.g., limiting or even eliminating director liability in certain situations, establishing specific statutes of limitation, allowing boards to take new constituencies into consideration, and the like. But until the recent adoptions of section 831 in Iowa, Maine and Mississippi, no state had a comprehensive statute covering standards of director liability.

Our only neighboring state to address the matter of standards of director liability to any significant extent in its corporate code is Utah. Utah Code Ann. § 16-10a-840(4) provides:

> (4) A director or officer is not liable to the corporation, its shareholders, or any conservator or receiver, or any assignee or successor-in-interest thereof, for any action taken, or any failure to take action, as an officer or director, as the case may be, unless:
>
> (a) the director or officer has breached or failed to perform the duties of the office in compliance with this section; and
>
> (b) the breach or failure to perform constitutes gross negligence, willful misconduct, or intentional infliction of harm on the corporation or the shareholders

Perhaps the most interesting aspect of new section 831 is its relationship to the famous judge-made "business judgment rule," a matter covered in depth in the ABA Committee's Official Comment. The Comment makes it clear that section 831 is not a codification, as such, of the business judgment rule. The idea is that, since the rule is and will continue to be developing in the courts, it would not be entirely logical to try to "freeze" it in a statutory description at a discrete moment in time. But the Comment also concedes that "[t]he section recognizes the common law doctrine and provides guidance as to its application in dealing with director liability claims." It seems to your reporter that section 831 is probably described as an "adjunct" to the business judgment rule.

30-1-832. [Reserved.]

30-1-833. Directors' liability for unlawful distributions. — (1) A director who votes for or assents to a distribution in excess of what may be authorized and made pursuant to section 30-1-640(1) or 30-1-1409(1), Idaho Code, is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating section 30-1-640(1) or 30-1-1409(1), Idaho Code, if the party asserting liability establishes that when taking the action the director did not comply with section 30-1-830, Idaho Code.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to:

(a) Contribution from every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) Recoupment from each shareholder of the pro rata portion of the amount of the unlawful distribution the shareholder accepted knowing the distribution was made in violation of section 30-1-640(1) or 30-1-1409(1), Idaho Code.

(3) A proceeding to enforce:

(a) The liability of a director under subsection (1) of this section is barred unless it is commenced within two (2) years after the date:

(i) On which the effect of the distribution was measured under section 30-1-640(5) or (7), Idaho Code; or

(ii) As of which the violation of section 30-1-640(1), Idaho Code, occurred as the consequence of disregard of a restriction in the articles of incorporation; or

(iii) On which the distribution of assets to shareholders under section 30-1-1409(1), Idaho Code, was made; or

(b) Contribution or recoupment under subsection (2) of this section is barred unless it is commenced within one (1) year after the liability of the claimant has been finally adjudicated under subsection (1) of this section.

History.

I.C., § 30-1-833, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 24, p. 907.

ABA OFFICIAL COMMENT

Although the revisions to the financial provisions of the Model Act have simplified and rationalized the rules for determining the validity of distributions (see sections 640 and 1409), the possibility remains that a distribution may be made in violation of these rules. Section 833 provides that if it is established a director failed to meet the relevant standards of conduct of section 830 (e.g., good faith, reasonable care, warranted reliance) and voted for or assented to an unlawful distribution, the director is personally liable for the portion of the distribution that exceeds the maximum amount that could have been lawfully distributed.

A director whose conduct, in voting for or assenting to a distribution, is challenged under section 833 will have all defenses which would ordinarily be available, including the common law business judgment rule. Relevant thereto, however, there would be common issues posed by (i) a defense geared to compliance with section 830 (e.g., reasonable care under subsection (2) and warranted reliance under subsections (4) and (5)) and, in the alternative, (ii) a defense relying on the business judgment rule's shield (e.g., informed judgment). Thus, section 830 compliance will in most cases make resort to the business judgment rule's shield unnecessary.

A director who is compelled to restore the amount of an unlawful distribution to the

corporation is entitled to contribution from every other director who could have been held liable for the unlawful distribution. The director may also recover the pro-rata portion of the amount of the unlawful distribution from any shareholder who accepted the distribution knowing that its payment was in violation of the statute. A shareholder (other than a director) who receives a payment not knowing of its invalidity is not subject to recoupment under subsection (2)(b). Although no attempt has been made in the Model Act to work out in detail the relationship between the right of recoupment from shareholders and the right of contribution from directors, it is expected that a court will equitably apportion the obligations and benefits arising from the application of the principles set forth in this section.

Section 833(3) limits the time within which a proceeding may be commenced against a director for an unlawful distribution to two years after the date on which the effect of the distribution was measured or breach of a restriction in the articles of incorporation occurred. Although a statute of limitations provision is a novel concept for the Model Act, a substantial minority of jurisdictions have provisions limiting the time within which an action may be brought on account of an unlawful distribution. Section 833(3) also limits the time within which a proceeding for contribution or recoupment may be made to one year after the date on which the liability of the claimant has been finally determined and adjudicated. This one-year period specified in clause (b) may end within or extend beyond the two-year period specified in clause (a).

IDAHO REPORTER'S COMMENT

The differences between then new Model Act § 833 when enacted in 1997 and prior I.C. § 30-1-48 (1969 Model Act § 48) were more technical and stylistic than substantially substantive. For example:

(1) Old section 48's separate subsection treatment of dividends, share repurchases and liquidation distributions was replaced with section 833's simple reference to "distribution," defined in section 140(6).

(2) The contribution rule was changed slightly to allow contribution "from every other director who could be held liable" instead of "from the other directors who voted for or assented to" the unlawful distribution.

(3) A two-year statute of limitations was added in ABA Official Text subsection (3), which coincidentally was part of Idaho's pre-1979 revision statute. This needs to be compared with I.C. § 5-237's three year statute for actions against directors and stockholders. The 1997 revisers decided to retain the three year provision in subsection (3).

The 2004 changes here were more a "fine tuning" than a significant substantive revision. For example, the reference at the outset of pre-existing section 833(1) to "a distribution made in violation of ... the articles of incorporation" was dropped as redundant because such a limit is part of the section 640(1) structure that is cross-referenced. And subsection (2)(b) clarifies that a director's action against shareholders who knowingly receive an unlawful distribution is for "recoupment," rather than for "contribution." Conceptually, contribution seems the wrong legal theory for recovery from a shareholder because it could imply some sort of per capita or comparative fault and liability analysis. The statute now more appropriately characterizes the directors' right against any such shareholders as recoupment rather than contribution. The amended version also clarifies that the director may recoup a pro rata portion of the unlawful distribution from any such shareholder.

The most substantive 2004 change was the new statute of limitations provisions in subsection (3), which (1) adopt the ABA Model Act's two-year limitations period for an action against a director and (2) add a new one-year period from the time a director's liability is finally adjudicated for an action for contribution or recoupment. Our pre-existing section 833 simply provided a three-year statute of limitations for "[a] proceeding under this section," with no separate provision for contribution or recoupment actions.

In the 1997 revision, we decided to keep our pre-existing three-year provision for actions against directors and stockholders in lieu of the Model Act's general two-year provision. The Idaho Bar Committee determined in 2004 that the two-year/one-year structure is reasonable and appropriate.

30-1-834 — 30-1-839. [Reserved.]

30-1-840. Required offices. — (1) A corporation has the offices described in its bylaws or designated by the board of directors in accordance with the bylaws.

(2) The board of directors may elect individuals to fill one (1) or more offices of the corporation. An officer may appoint one (1) or more officers if authorized by the bylaws or the board of directors.

(3) The bylaws or the board of directors shall assign to one (1) of the officers responsibility for preparing the minutes of the directors' and shareholders' meetings and for maintaining and authenticating the records of the corporation required to be kept under sections 30-1-1601(1) and (2), Idaho Code.

(4) The same individual may simultaneously hold more than one (1) office in a corporation.

History.

I.C., § 30-1-840, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 25, p. 907.

ABA OFFICIAL COMMENT

Section 840 permits every corporation to designate the offices it wants. The designation may be made in the bylaws or by the board of directors consistently with the bylaws. This is a departure from earlier versions of the Model Act and most state corporation acts, which require certain offices, usually the president, the secretary, and the treasurer, and generally authorize the corporation to designate additional offices. Experience has shown, however, that little purpose is served by a statutory requirement that there be certain offices, and statutory requirements may sometimes create problems of apparent authority or confusion with nonstatutory offices the corporation desires to create.

Section 840(2) indicates that, while it is generally the responsibility of the board of directors to elect officers, an officer may appoint one or more officers if authorized by the bylaws or the board of directors.

The board of directors, as well as duly authorized officers, employees or agents, may also appoint other agents for the corporation. Nothing in this section is intended to limit the authority of a board of directors to organize its own internal affairs, including designating officers of the board.

The bylaws or the board of directors must assign to an officer the responsibility to prepare minutes and authenticate the corporate records referred to in sections 1601(1) and (2); the person performing this function is referred to as the "secretary" of the corporation throughout the Model Act. See section 140. Under the Act, a corporation may have this and all other corporate functions, performed by a single individual.

The person who is designated by the bylaws or the board to have responsibility for preparing minutes of meetings and maintaining the corporate records has authority to bind the corporation by that officer's authentication under this section. This assignment of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiry as to their truth or accuracy.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 840 eliminated the prior I.C. § 30-1-50 list of required named officers and the rule against the same person being both president and secretary. In addition, any reference to "election" of officers was changed to "appointment." Subsection (3) assured that "corporate secretary functions" will be taken care of by some "officer."

The section's title was changed in 2004 from "officers" to "officer." This change probably should have been made in 1997. As noted in the Official Comment, "[e]xperience has shown... that little purpose is served by a statutory requirement that there be certain offices ...." Also in 2004 section 840(2) was clarified, making it explicit that the general practice is director election of officers, but that an officer may appoint one or more officers if authorized by the bylaws or board.

30-1-841. Duties of officers. — Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with

the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

History.
I.C., § 30-1-841, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 841 recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the duties of other officers.

These methods of investing officers with formal authority do not exhaust the sources of an officer's actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have implied authority merely by virtue of their positions. This authority, which may overlap the express authority granted by the bylaws, generally has been viewed as extending only to ordinary business transactions, though some cases have recognized unusually broad implied authority of the chief executive officer or have created a presumption that corporate officers have broad authority, thereby placing on the corporation the burden of showing lack of authority. Corporate officers may also be vested with apparent (or ostensible) authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be expressed or implied and may in some cases serve as the basis of apparent (or ostensible) authority.

IDAHO REPORTER'S COMMENT

New Model Act § 841 makes only one substantive change from the second paragraph of prior I.C. § 30-1-50 (1969 Model Act § 50), namely, the clarification that an officer may prescribe the duties of other officers, if authorized by the bylaws or the board of directors.

30-1-842. Standards of conduct for officers. — (1) An officer, when performing in such capacity, shall act:

(a) In good faith;

(b) With the care that a person in a like position would reasonably exercise under similar circumstances; and

(c) In a manner the officer reasonably believes to be in the best interests of the corporation.

(2) In discharging those duties an officer, who does not have knowledge that makes reliance unwarranted, is entitled to rely on:

(a) The performance of properly delegated responsibilities by one (1) or more employees of the corporation whom the officer reasonably believes to be reliable and competent in performing the responsibilities delegated; or

(b) Information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by one (1) or more employees of the corporation whom the officer reasonably believes to be competent in the matters presented or by legal counsel, public accountants or other persons retained by the corporation as to matters involving skill or expertise the officer reasonably believes are matters:

(i) Within the particular person's professional or expert competence; or

(ii) As to which the particular person merits confidence.

(3) An officer shall not be liable to the corporation or its shareholders for any decision to take or not to take action or any failure to take action, as an officer, if the duties of the office are performed in compliance with this section. Whether an officer who does not comply with this section shall have liability will depend in such instance on applicable law, including those principles of section 30-1-831, Idaho Code, that have relevance.

History.

I.C., § 30-1-842, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 26, p. 907.

ABA OFFICIAL COMMENT

This section provides that an officer, when performing in such officer's official capacity, shall meet standards of conduct generally similar to those expected of directors under section 830. Consistent with the principles of agency, which generally govern the conduct of corporate employees, an officer is expected to observe the duties of obedience and loyalty and to act with the care that a person in a like position would reasonably exercise under similar circumstances. See Restatement (Second) of Agency § 379(1) (1957) ("Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has").

An officer's ability to rely on others may be more limited, depending upon the circumstances of the particular case, than the measure and scope of reliance permitted a director under section 830, in view of the greater obligation the officer may have to be familiar with the affairs of the corporation. The proper delegation of responsibilities by an officer, separate and apart from the exercise of judgment as to the delegatee' s reliability and competence, is concerned with the procedure employed. This will involve, in the usual case, sufficient communication to the end that the delegatee understands the scope of the assignment and, in turn, manifests to the officer a willingness and commitment to undertake its performance. The definition of "employee" in section 140(8) includes an officer; accordingly, section 842 contemplates the delegation of responsibilities to other officers as well as to nonofficer employees.

It is made clear, in subsection (3), that performance meeting the section's standards of conduct will eliminate an officer's exposure to any liability to the corporation or its shareholders. In contrast, an officer failing to meet its standards will not automatically face liability. Deficient performance of duties by an officer, depending upon the facts and circumstances, will normally be dealt with through intracorporate disciplinary procedures, such as reprimand, compensation adjustment, delayed promotion, demotion or discharge. Such a procedure would be subject to any employment agreement between the corporation and the officer. See section 843.

In some cases, failure to observe relevant standards of conduct can give rise to an officer's liability to the corporation or its shareholders. A court review of challenged conduct will involve an evaluation of the particular facts and circumstances in light of applicable law. In this connection, subsection (3) recognizes that relevant principles of section 831, such as duties to deal fairly with the corporation and its shareholders and the challenger's burden of establishing proximately caused harm, should be taken into account. In addition, the business judgment rule will normally apply to decisions within an officer's discretionary authority. Liability to others can also arise from an officer's own acts or omissions (e.g., violations of law or tort claims) and, in some cases, an officer with supervisory responsibilities can have risk exposure in connection with the acts or omissions of others.

The Official Comment to section 830 supplements this Official Comment to the extent that it can be appropriately viewed as generally applicable to officers as well as to directors.

IDAHO REPORTER'S COMMENT

Model Act § 842 was entirely new when enacted in Idaho in 1997 and followed the language of then new section 830, dealing with directors' standards of conduct. Section 842 was limited to discretionary conduct, and it is recognized that an officer's scope of duties may qualify the standard of conduct required by the statute. Further, the distinction should be kept in mind

between these standards of conduct and the officers' fiduciary duties to the corporation and its shareholders. The latter are defined by judicial law rather than legislative enactment.

2004 revisions to section 842 accomplished two things: (1) As amended, section 842 covers all officers, rather than just officers "with discretionary authority," as in prior Idaho section 842; and (2) since section 842 applies to officers standard of conduct generally similar to those applied to directors under section 830, section 842 was amended to reflect the amendments to sections 830 and 831 on standards of conduct and liability for directors.

30-1-843. Resignation and removal of officers. — (1) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective time. If a resignation is made effective at a later time and the board or the appointing officer accepts the future effective time, the board or the appointing officer may fill the pending vacancy before the effective time if the board or the appointing officer provides that the successor does not take office until the effective time.

(2) An officer may be removed at any time with or without cause by:

(a) The board of directors;

(b) The officer who appointed such officer, unless the bylaws or the board of directors provide otherwise; or

(c) Any other officer if authorized by the bylaws or the board of directors.

(3) In this section, "appointing officer" means the officer, including any successor to that officer, who appointed the officer resigning or being removed.

History.

I.C., § 30-1-843, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 27, p. 907.

ABA OFFICIAL COMMENT

Section 843(1) is consistent with current practice and declaratory of current law. It recognizes: that corporate officers may resign; that, with the consent of the board of directors or the appointing officer, they may resign effective at a later date; and that a future vacancy may be filled to become effective as of the effective date of the resignation.

In part because of the unlimited power of removal confirmed by section 843(2), a board of directors may enter into an employment agreement with the holder of an office that extends beyond the team of the board of directors. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are elected for a term shorter than the period of the employment contract. If a later board of directors refuses to reelect that person as an officer, the person has the right to sue for damages but not for specific performance of the contract.

Section 843(2) is consistent with current practice and declaratory of current law. It recognizes that the officers of the corporation are subject to removal by the board of directors and, in certain instances, by other officers. It provides the corporation with the flexibility to determine when, if ever, an officer will be permitted to remove another officer. To the extent that the corporation wishes to permit an officer, other than the appointing officer, to remove another officer, the bylaws or a board resolution should set forth clearly the persons having removal authority.

A person may be removed from office irrespective of contract rights or the presence or absence of "cause" in a legal sense. Section 844 provides that removal from office of a holder who has contract rights is without prejudice to whatever rights the former officer may assert in a suit for damages for breach of contract.

IDAHO REPORTER'S COMMENT

First enacted in Idaho in 1997, Model Act § 843(1), unlike prior I.C. § 30-1-51, addresses resignation as well as removal of officers.

In 2004 subsection (2) was revised to provide than an officer may be removed not only by the board, but also by any officer who appointed the removed officer, unless the bylaws or board provide otherwise. Also, a new subsection (3) was added, defining "appointing officer."

30-1-844. Contract rights of officers. — (1) The appointment of an officer does not itself create contract rights.

(2) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

History.
I.C., § 30-1-844, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 843 makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to his later enforcement of contract rights in a suit for damages for breach of contract. See the Official Comment to section 843. Similarly, an officer with an employment contract who prematurely resigns may be in breach of his employment contract. The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term.

IDAHO REPORTER'S COMMENT

The second sentence in subsection (2) is new. Otherwise, new Model Act § 844 seems simply to restate existing law as to the basic distinction between the status of officer and any contract rights.

30-1-845 — 30-1-849. [Reserved.]

30-1-850. Definitions. — For purposes of sections 30-1-850 through 30-1-859, Idaho Code:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose duties on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate or personal representative of a director or officer.

(3) "Disinterested director" means a director who, at the time of a vote referred to in section 30-1-853(3), Idaho Code, or a vote or selection referred to in section 30-1-855(2) or (3), Idaho Code, is not:

(a) A party to the proceeding; or

(b) An individual having a familial, financial, professional or employment relationship with the director whose indemnification or advance for

expenses is the subject of the decision being made, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made.

(4) "Expenses" includes counsel fees.

(5) "Liability" means the obligation to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses incurred with respect to a proceeding.

(6) "Official capacity" means:

(a) When used with respect to a director, the office of director in a corporation; and

(b) When used with respect to an officer, as contemplated in section 30-1-856, Idaho Code, the office in a corporation held by the officer. "Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan or other entity.

(7) "Party" means an individual who was, is or is threatened to be made, a defendant or respondent in a proceeding.

(8) "Proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative and whether formal or informal.

History.

I.C., § 30-1-850, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The definitions set forth in section 850 apply only to sections 850 through 859 and have no application elsewhere in the Model Act (except as set forth in section 202(2)(e)).

1. CORPORATION. A special definition of "corporation" is included in sections 850 through 859 to make it clear that predecessor entities that have been absorbed in mergers are included within the definition. It is probable that the same result would be reached for many transactions under section 1106(1) (effect of merger), which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their predecessors under sections 850 through 859 is broader than under section 1106(1) and may impose liability on a successor although section 1106(1) does not. Section 850(1) is thus an essential aspect of the protection provided by sections 850 through 859 for persons eligible for indemnification.

2. DIRECTOR AND OFFICER. A special definition of "director" and "officer" is included in sections 850 through 859 to cover individuals who are made parties to proceedings because they are or were directors or officers or, while serving as directors or officers, also serve or served at the corporation's request in another capacity for another entity. The purpose of the latter part of this definition is to give directors and officers the benefits of the protection of sections 850 through 859 while serving at the corporation's request in a responsible position for employee benefit plans, trade associations, nonprofit or charitable entities, domestic or foreign entities, or other kinds of profit or nonprofit ventures. To avoid misunderstanding, it is good practice from both the corporation's and director's or officer's viewpoint for this type of request to be evidenced by resolution, memorandum or other writing. The definition covers an individual who is or was either a director or officer so that further references in the remainder of sections 850 through 859 to an individual who is a director or officer necessarily include former directors or officers.

The second sentence of section 850(2) addresses the question of liabilities arising under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992). It makes clear that a director or officer who is serving as a fiduciary of an employee benefit plan is automatically viewed for purposes of sections 850 through 859 as having been requested by the corporation to act in that capacity. Special treatment is believed

necessary because of the broad definition of "fiduciary" in section 3(21) of ERISA, 29 U.S.C. § 1002(21) (1988), and the requirement of section 404 (29 U.S.C. § 1104(a) (1988)) that a "fiduciary" must discharge his duties "solely in the interest" of the participants and beneficiaries of the employee benefit plan. Decisions by a director or officer serving as a fiduciary under the plan on questions regarding eligibility for benefits, investment decisions, and interpretation of plan provisions regarding qualifying service, years of service, and retroactivity are all subject to the protections of sections 850 through 859. See also sections 850(5) and 851(2).

The last sentence of section 850(2) provides that the estate or personal representative of a director or officer is entitled to the rights of indemnification possessed by the director or officer himself. The phrase "unless the context requires otherwise" was added to make clear that the estate or personal representative does not have the right to participate in directorial decisions authorized in sections 850 through 859.

3. DISINTERESTED DIRECTOR. This term identifies, for purposes of §§ 850-859, those members of the board who are eligible to make, in the first instance, the authorizations and determinations required in connection with decisions on advance for expenses and indemnification. It is used only in sections 853(3) and 855(2) and (3) and is not applicable to any other sections of the Act. (See section 862 where the term "qualified director" is used in connection with conflicting interest transactions.)

To be a "disinterested director," a member of the board must not be a party to the proceeding at the time the board makes the determination or authorization and he must not be the subject of the request for advance or indemnification with respect to which action is being taken. He must also not have a familial, financial, professional or employment relationship that could reasonably be expected to influence his decision. The fact that a director was nominated for the board by directors who are parties to the proceeding or are interested in the request or is a director of another corporation of which the director who is a party to the proceeding or is interested in the request is also a director should not, absent unusual circumstances, constitute a disqualifying relationship.

4. EXPENSES. "Expenses" is defined to include counsel fees in order to avoid repeated references to such fees every time "expenses" appears throughout sections 850 through 859. "Expenses" does not include the other items listed in the definition of "liability," such as judgments or amounts paid in settlement.

5. LIABILITY. "Liability" is defined for convenience in order to avoid repeated references to recoverable items throughout sections 850 through 859. Even though the definition of "liability" includes amounts paid in settlement or to satisfy a judgment, indemnification against certain types of settlements and judgments is not allowed under several provisions of sections 850 through 859. For example, indemnification in suits brought by or in the right of the corporation is limited to expenses (see section 851 (4)(a)), unless indemnification for a settlement is ordered by a court under section 854(1)(c).

The definition of "liability" permits the indemnification only of "reasonable expenses incurred." The intention is that any portion of expenses falling outside the perimeter of reasonableness should not be advanced or indemnified. In contrast, unlike earlier versions of the Model Act and statutes of many states, section 850(5) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive — mandatory indemnification is available under section 852 only where the defendant is "wholly successful" — a special limitation of "reasonableness" for settlements is inappropriate.

"Penalties" and "fines" are expressly included within the definition of "liability" so that, in appropriate cases, these items may also be indemnified. The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties, restitution, and obligations to give notice. This definition also expressly includes as a "fine" the levy of excise taxes under the Internal Revenue Code pursuant to ERISA.

6. OFFICIAL CAPACITY. The definition of "official capacity" is necessary because the term determines which of the two alternative standards of conduct set forth in section 851(1)(a)(ii) applies: If action is taken in an "official capacity," the person to be indemnified must have reasonably believed he was acting in the best interests of the corporation, while if the action in question was not taken in his "official capacity," he need only have reasonably believed that the conduct was not opposed to the best interests of the corporation. See also the Official Comment to section 851(1).

7. PARTY. The definition of "party" includes every "individual who was, is, or is threatened to be made, a defendant or respondent in a proceeding." Thus, the definition includes present and former parties in addition to individuals currently or formerly threatened with being made a party. An individual who is only called as a witness is not a "party" within this definition and, as specifically provided in section 858(4), payment or reimbursement of his expenses is not limited by sections 850 through 859.

8. PROCEEDING. The broad definition of "proceeding" ensures that the benefits of sections 850 through 859 will be available to directors in new and unexpected, as well as traditional, types of litigation or other adversarial matters, whether civil, criminal, administrative, or investigative. It also includes arbitration and other dispute resolution proceedings, lawsuit appeals and petitions to review administrative actions.

IDAHO REPORTER'S COMMENT

Comment on New §§ 850-859 in General. New Model Act §§ 850 through 859 reorganize 1969 Model Act § 5 [prior I.C. § 30-1-5] into a separate grouping and make several substantive and numerous stylistic changes. The division of what was a single section of the prior Act into ten different sections in the current Act was designed by the ABA Committee to simplify the use of the provisions.

Among the most important substantive changes from prior I.C. § 30-1-5 are provisions (1) making the basic scheme exclusive to directors (officers are covered separately in new section 856), (2) giving directors and certain others the right to seek court approval for indemnification when not otherwise entitled to it under the Act, (3) precluding indemnification to those receiving an improper personal benefit and (4) requiring notice to shareholders when payments are made to directors under the Act. Each of these changes will be discussed separately in connection with the appropriate sections in the comments that follow.

30-1-851. Permissible indemnification. — (1) Except as otherwise provided in this section, a corporation may indemnify an individual who is a party to a proceeding because he is a director against liability incurred in the proceeding if:

(a)(i) He conducted himself in good faith; and

(ii) He reasonably believed:

(A) In the case of conduct in his official capacity, that his conduct was in the best interests of the corporation, and

(B) In all cases, that his conduct was at least not opposed to the best interests of the corporation; and

(iii) In the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful; or

(b) He engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation, as authorized by section 30-1-202(2) (e), Idaho Code.

(2) A director's conduct with respect to an employee plan for a purpose he reasonably believed to be in the best interests of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of subsection (1) (a) (ii) (B) of this section.

(3) The termination of a proceeding by judgment, order, settlement or conviction, or upon a plea of nolo contendere or its equivalent, is not, of itself, determinative that the director did not meet the relevant standard of conduct described in this section.

(4) Unless ordered by a court under section 30-1-854(1)(c), Idaho Code, a corporation may not indemnify a director:

(a) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (1) of this section; or

(b) In connection with any proceeding with respect to conduct for which he was adjudged liable on the basis that he received a financial benefit to

which he was not entitled, whether or not involving action in his official capacity.

History.

I.C., § 30-1-851, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

1. SECTION 851(1). Subsection 851(1) permits, but does not require, a corporation to indemnify directors if the standards of subsection (1)(a) or of a provision of the articles referred to in subsection (1)(b) are met. This authorization is subject to any limitations set forth in the articles of incorporation pursuant to section 858(3). Absent any such limitation, the standards for indemnification of directors contained in this subsection define the outer limits for which discretionary indemnification is permitted under the Model Act. Conduct which does not meet one of these standards is not eligible for permissible indemnification under the Model Act, although court-ordered indemnification may be available under section 854(1)(c). Conduct that falls within these outer limits does not automatically entitle directors to indemnification, although a corporation may obligate itself to indemnify directors to the maximum extent permitted by applicable law. See section 858(1). No such obligation, however, may exceed these outer limits. Absent such an obligatory provision, section 852 defines much narrower circumstances in which directors are entitled as a matter of right to indemnification.

Some state statutes provide separate, but usually similarly worded, standards for indemnification in third-party suits and indemnification in suits brought by or in the right of the corporation. Section 851 makes clear that the outer limits of conduct for which indemnification is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, section 851(4)(a) limits indemnification in connection with suits brought by or in the right of the corporation to expenses incurred and excludes amounts paid to settle such suits or to satisfy judgments. In addition, to discourage wrongdoing, section 851(4)(b) bars indemnification where the director has been adjudged to have received a financial benefit to which he is not entitled. Nevertheless, a court may order certain relief from these limitations under section 854(1)(c).

The standards of conduct described in subsections (1)(a)(i) and (1)(a)(ii)(A) that must be met in order to permit the corporation to indemnify a director are closely related, but not identical, to the standards of conduct imposed on directors by section 830. Section 830(1) requires a director acting in his official capacity to discharge his duties in good faith, with due care (i.e., that which an ordinarily prudent person in a like position would exercise under similar circumstances) and in a manner he reasonably believes to be in the corporation's best interests. Unless authorized by a charter provision adopted pursuant to subsection (1)(b), it would be difficult to justify indemnifying a director who has not met any of these standards. It would not, however, make sense to require a director to meet all these standards in order to be indemnified because a director who meets all three of these standards would have no liability, at least to the corporation, under the terms of section 830(4).

Section 851(1) adopts a middle ground by authorizing discretionary indemnification in the case of a failure to meet the due care standard of section 830(1) because public policy would not be well served by an absolute bar. A director's potential liability for conduct which does not on each and every occasion satisfy the due care requirement of section 830(1), or which with the benefit of hindsight could be so viewed, would in all likelihood deter qualified individuals from serving as directors and inhibit some who serve from taking risks. Permitting indemnification against such liability tends to counter these undesirable consequences. Accordingly, section 851(1) authorizes indemnification at the corporation's option even though section 830's due care requirement is not met, but only if the director satisfies the "good faith" and "corporation's best interests" standards. This reflects a judgment that, balancing public policy considerations, the corporation may indemnify a director who does not satisfy the due care test but not one who fails either of the other two standards.

As in the case of section 830, where the concept of good faith is also used, no attempt is made in section 851 to provide a definition. The concept involves a subjective test, which would permit indemnification for "a mistake of judgment," in the words of the Official Comment to section 830, even though made unwisely or negligently by objective standards. Section 851 also requires, as does section 830, a "reasonable" belief by a director acting in his official capacity that his conduct was in the corporation's best interests. It then adds a provision, not found in section 830, relating to criminal proceedings that requires the director to have had no

"reasonable cause" to believe that his conduct was unlawful. These both involve objective standards applicable to the director's belief concerning the effect of his conduct. Conduct includes both acts and omissions.

Section 851(1)(a)(ii)(B) requires, if a director is not acting in his official capacity, that his action be "at least not opposed to" the corporation's best interests. This standard is applicable to the director when serving another entity at the request of the corporation or when sued simply because of his status as a director. The words "at least" qualify "not opposed to" in order to make it clear that this standard is an outer limit for conduct other than in an official capacity. While this subsection is directed at the interests of the indemnifying (i.e., requesting) corporation, a director serving another entity by request remains subject to the provisions of the law governing his service to that entity, including provisions dealing with conflicts of interest. Compare sections 860-863. Should indemnification from the requesting corporation be sought by a director for acts done while serving another entity, which acts involved breach of the duty of loyalty owed to that entity, nothing in section 851(1)(a)(ii)(B) would preclude the requesting corporation from considering, in assessing its own best interests, whether the fact that its director had engaged in a violation of the duty owed to the other entity was in fact "opposed to" the interests of the indemnifying corporation. Receipt of an improper financial benefit from a subsidiary would normally be opposed to the best interests of the parent.

Section 851 also permits indemnification in connection with a proceeding involving an alleged failure to satisfy legal standards other than the standards of conduct in section 830, e.g., violations of federal securities laws and environmental laws. It should be noted, however, that the Securities and Exchange Commission takes the position that indemnification against liabilities under the Securities Act of 1933 is against public policy and requires that, as a condition for accelerating the effectiveness of a registration statement under the Act, the issuer must undertake that, unless in the opinion of its counsel the matter has been settled by controlling precedent, it will submit to a court the question whether such indemnification is against public policy as expressed in the Act. 17 C.F.R. § 229.512(h)(1993).

In addition to indemnification under section 851(1)(a), section 851(1)(b) permits indemnification under the standard of conduct set forth in a charter provision adopted pursuant to section 202(2)(e). Based on such a charter provision, section 851(1)(b) permits indemnification in connection with claims by third parties and, through section 856, applies to officers as well as directors. (This goes beyond the scope of a charter provision adopted pursuant to section 202(2)(d), which can only limit liability of directors against claims by the corporation or its shareholders.) Section 851(1)(b) is subject to the prohibition of subsection (4)(a) against indemnification of settlements and judgments in derivative suits. It is also subject to the prohibition of subsection (4)(b) against indemnification for receipt of an improper financial benefit; however, this prohibition is already subsumed in the exception contained in section 202 (2)(e)(A).

Notice of any indemnification under this section (or sections 852, 853 or 854) in a derivative proceeding must be given to the shareholders pursuant to section 1621(1).

2. SECTION 851(2). As discussed in the Official Comment to section 850(2), ERISA requires that a "fiduciary" (as defined in ERISA) discharge his duties "solely in the interest" of the participants in and beneficiaries of an employee benefit plan. Section 851(2) makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under section 851(1) if he reasonably believes his conduct was in the best interests of the participants in and beneficiaries of the plan. This standard is arguably an exception to the more general standard that conduct not in an official corporate capacity is indemnifiable if it is "at least not opposed to" the best interests of the corporation. However, a corporation that causes a director to undertake fiduciary duties in connection with an employee benefit plan should expect the director to act in the best interests of the plan's beneficiaries or participants. Thus, subsection (2) establishes and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA. See Official Comment to section 850(2).

3. SECTION 851(3). The purpose of section 851(3) is to reject the argument that indemnification is automatically improper whenever a proceeding has been concluded on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue of whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the relevant standard of subsection (1) since a settlement or nolo plea may be agreed to for many reasons unrelated to the merits of the claim. On the other hand, a final determination of non-liability (including one based on a liability-

limitation provision adopted under section 202(2)(d)) or an acquittal in a criminal case automatically entitles the director to indemnification of expenses under section 852.

Section 851(3) applies to the indemnification of expenses in derivative proceedings (as well as to indemnification in third party suits). The most likely application of this subsection in connection with a derivative proceeding will be to a settlement since a judgment or order would normally result in liability to the corporation and thereby preclude indemnification for expenses under section 851(4)(a), unless ordered by a court under section 854(1)(c). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the relevant standard of conduct.

4. SECTION 851(4). This subsection makes clear that indemnification is not permissible under section 851 in two situations: (i) a proceeding brought by or in the right of a corporation that results in a settlement or a judgment against the director and (ii) a proceeding that results in a judgment that the director received an improper financial benefit as a result of his conduct.

Permitting indemnification of settlements and judgments in derivative proceedings would give rise to a circularity in which the corporation receiving payment of damages by the director in the settlement or judgment (less attorneys' fees) would then immediately return the same amount to the director (including attorneys' fees) as indemnification. Thus, the corporation would be in a poorer economic position than if there had been no proceeding. This situation is most egregious in the case of a judgment against the director. Even in the case of a settlement, however, prohibiting indemnification is not unfair. Under the revised procedures of ABA Official Text section 7.44 [not adopted in Idaho in the 1997 revision which instead retained a cross-reference to rule 23(f) of the Idaho rules of civil procedure — see section 30-1-740, above], upon motion by the corporation, the court must dismiss any derivative proceeding which independent directors (or a court-appointed panel) determine in good faith, after a reasonable inquiry, is not in the best interests of the corporation. Furthermore, under section 202(2)(d), the directors have the opportunity to propose to shareholders adoption of a provision limiting the liability of directors in derivative proceedings. In view of these considerations, it is unlikely that directors will be unnecessarily exposed to meritless actions. In addition, if directors were to be indemnified for amounts paid in settlement, the dismissal procedures in ABA Official Text section 7.44 might not be fully employed since it could be less expensive for the corporation to indemnify the directors immediately for the amount of the claimed damages rather than bear the expense of the inquiry required by ABA Official Text section 7.44. The result could increase the filing of meritless derivative proceedings in order to generate small but immediately paid attorneys' fees. Despite the prohibition on indemnification of a settlement or a judgment in a derivative proceeding, subsection (4)(a) permits indemnification of the related reasonable expenses incurred in the proceeding so long as the director meets the relevant standard of conduct set forth in section 851(1). In addition, indemnification of derivative proceeding expenses and amounts paid in settlement where the relevant standard was not met may be ordered by a court under section 854(1)(c).

If a corporation indemnifies a director in connection with a derivative proceeding, the corporation must report that fact to the shareholders prior to their next meeting. See section 1621(1).

Indemnification under section 851 is also prohibited if there has been an adjudication that a director received an improper financial benefit (i.e., a benefit to which he is not entitled), even if, for example, he acted in a manner not opposed to the best interests of the corporation. For example, improper use of inside information for financial benefit should not be an action for which the corporation may elect to provide indemnification, even if the corporation was not thereby harmed. Given the express language of section 202(2)(e) establishing the outer limit of an indemnification provision contained in the articles of incorporation, a director found to have received an improper financial benefit would not be permitted indemnification under subsection (1)(b). Although it is unlikely that a director found to have received an improper financial benefit could meet the standard in subsection (1)(a)(ii)(B), this limitation is made explicit in section 851(4)(b). Section 854(1)(c) permits a director found liable in a proceeding referred to in subsection (4)(b) to petition a court for a judicial determination of entitlement to indemnification for reasonable expenses. The language of section 851(4)(b) is based on section 202(2)(d)(A) and, thus, the same standards should be used in interpreting the application of both provisions. Although a settlement may create an obligation to pay money, it should not be construed for purposes of sections 850 through 859 as an adjudication of liability.

IDAHO REPORTER'S COMMENT

As noted above in your reporter's comment to new section 850, the division of what was all contained in old § 5 into ten different sections is designed to simplify use of the indemnification

provisions. The benefits of this new design can be first appreciated here in new section 851, separately breaking out the provisions on permissible indemnification.

Matters of substance worthy of specific notice here include (1) the subsection (2) reference to directors' conduct with respect to employee benefit plans, (2) the subsection (4)(a) general prohibition against indemnification of a settlement or judgment in a derivative suit and (3) the subsection (4)(b) general prohibition against indemnification where the director has been adjudged to have received an improper financial benefit.

Montana, Oregon, Utah, Washington and Wyoming are among at least fifteen states that have adopted new section 851 without substantive change.

30-1-852. Mandatory indemnification. — A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

History.

I.C., § 30-1-852, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 851 determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 852 determines whether a corporation must indemnify a director for his expenses; in other words, section 852 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by section 854(1)(a). Section 854(2) gives the director a statutory right to recover expenses incurred by him in enforcing his statutory right to indemnification under section 852.

The basic standard for mandatory indemnification is that the director has been "wholly successful, on the merits or otherwise," in the defense of the proceeding. The word "wholly" is added to avoid the argument accepted in *Merritt-Chapman & Scott Corp. v. Wolfson,* 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if, by plea bargaining or otherwise, he was able to obtain the dismissal of some but not all counts of an indictment. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which does not involve a finding of liability. A director who is precluded from mandatory indemnification by this requirement may still be entitled to permissible indemnification under section 851(1) or court-ordered indemnification under section 854(1)(c).

The language in earlier versions of the Model Act and in many other state statutes that the basis of success may be "on the merits or otherwise" is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits, e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

If the corporation indemnifies or advances expenses to a director in connection with a derivative proceeding, the corporation must report that fact to the shareholder prior to their next meeting. See section 1621(1).

IDAHO REPORTER'S COMMENT

The only real substantive change here from prior I.C. § 30-1-5(c) is the addition of the adverb "wholly" to avoid the argument that a defendant may be entitled to partial mandatory indemnification if able to obtain dismissal of some but not all counts of an indictment. A director who is precluded from mandatory indemnification by this requirement may still be entitled to permissible indemnification under section 851(1) or court-ordered indemnification under section 854(1)(c).

30-1-853. Advance for expenses. — (1) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the

reasonable expenses incurred by a director who is a party to a proceeding because he is a director if he delivers to the corporation:

(a) A written affirmation of his good faith belief that he has met the relevant standard of conduct described in section 30-1-851, Idaho Code, or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by section 30-1-202(2)(d), Idaho Code; and

(b) His written undertaking to repay any funds advanced if he is not entitled to mandatory indemnification under section 30-1-852, Idaho Code, and it is ultimately determined under section 30-1-854 or 30-1-855, Idaho Code, that he has not met the relevant standard of conduct described in section 30-1-851, Idaho Code.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(3) Authorizations under this section shall be made:

(a) By the board of directors:

(i) If there are two (2) or more disinterested directors, by a majority vote of all the disinterested directors, a majority of whom shall for such purposes constitute a quorum, or by a majority of the members of a committee of two (2) or more disinterested directors appointed by such a vote; or

(ii) If there are fewer than two (2) disinterested directors, by the vote necessary for action by the board in accordance with section 30-1-824(3), Idaho Code, in which authorization directors who do not qualify as disinterested directors may participate; or

(b) By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the authorization.

History.

I.C., § 30-1-853, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 853 authorizes, but does not require, a corporation to pay for or reimburse, in advance, a director's reasonable expenses if two conditions are met. This authorization is subject to any limitations set forth in the articles of incorporation pursuant to section 858(3).

Section 853 recognizes an important difference between indemnification and an advance for expenses: Indemnification is retrospective and, therefore, enables the persons determining whether to indemnify to do so on the basis of known facts, including the outcome of the proceeding. Advance for expenses is necessarily prospective and the individuals making the decision whether to advance expenses generally have fewer known facts on which to base their decision. Indemnification may include reimbursement for non-advanced expenses.

Section 853 reflects a determination that it is sound public policy to permit the corporation to advance (by direct payment or by reimbursement) the defense expenses of a director so long as the director believes in good faith that he was acting in accordance with the relevant standard for indemnification set forth in section 851 or that the proceeding involves conduct for which liability has been eliminated pursuant to section 202(2)(d) and agrees to repay any amounts advanced if it is ultimately determined that he is not entitled to indemnification. This policy is based upon the view that a person who serves an entity in a representative capacity should not be required to finance his own defense. Moreover, adequate legal representation

often requires substantial expenses during the proceeding and many individuals are willing to serve as directors only if they have the assurance that the corporation has the power to advance these expenses. In fact, many corporations contractually obligate themselves (by a provision in the articles or bylaws or otherwise) to advance expenses for directors. See section 858(1).

Section 853(1) requires a written affirmation by the director of his good faith belief that he has met the relevant standard of conduct necessary for indemnification by the corporation and a written undertaking by the director to repay any funds advanced if it is ultimately determined that he has not met the standard of conduct. A single undertaking may cover all funds advanced in connection with the proceeding. Under section 853(2), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that wealthy directors should not be favored over directors whose financial resources are modest. The undertaking must be made by the director and not by a third party. If the director or the corporation wishes some third party to be responsible for the director's obligation in this regard, either of them is free to make those arrangements separately with the third party.

In the absence of an obligatory provision established pursuant to section 858(1), the decision to advance expenses must be made in accordance with section 853(3). Section 853 does not address the question of the standard by which the decision to advance expenses is to be made. Accordingly, the standards of section 830 should, in general, govern. The conditions for advance for expenses are different from the conditions for indemnification. Directors normally meet the standards of section 830 in approving an advance for expenses if they limit their consideration to the financial ability of the corporation to pay the amounts in question and do not have actual knowledge of facts sufficient to cause them to believe that the subsection (1)(a) affirmation was not made in good faith. The directors are not required by section 830 to make any inquiry into the merits of the proceeding or the good faith of the belief stated in that affirmation. Thus, in the great majority of cases, no special inquiry will be required. The directors acting on a decision to advance expenses may, but are not required to, consider any additional matters they deem appropriate and may condition the advance of expenses upon compliance with any additional requirements they desire to impose.

Advance for expenses under section 853 may be made obligatory upon a corporation pursuant to section 858(1) by a provision set forth in its articles of incorporation or bylaws, in a resolution of its shareholders or board of directors, in a contract or otherwise. However, any such provision must comply with the requirements of subsection (1) of section 853 regarding furnishing of an affirmation and undertaking. No other procedures are contemplated, although obligatory provisions may include notice and other procedures in connection with advancement of expenses and indemnification requests.

At least one court has held that a general obligatory provision requiring indemnification to the extent permitted by law does not include advance for expenses if not specifically mentioned. E.g., *Advanced Mining Systems, Inc. v. Fricke,* 623 A.2d 82 (Del. 1992). Section 858(1) requires the opposite result, unless provided otherwise.

The decision to advance expenses is required to be made only one time with respect to each proceeding rather than each time a request for payment of expenses is received by the corporation. The directors are, however, free to reconsider the decision at any time, e.g., upon a change in the financial ability of the corporation to pay the amounts in question. The decision as to the reasonableness of any expenses may be made by any officer or agent of the corporation duly authorized to do so.

The procedures set forth in subsection (3) for authorizing an advance for expenses parallel the procedures set forth in section 855(2) for selecting the person or persons to make the determination that indemnification is permissible. Unless the authorization is made by the shareholders under subsection (3)(b), first resort must be made to subsection (3)(a)(i). If it is unavailable, then resort may be made to subsection (3)(a)(ii).

Under subsection (3)(a)(i), the vote required when the disinterested directors act as a group is an absolute majority of their number. A majority of the disinterested directors constitutes a quorum for board action for this purpose.

The committee of two or more disinterested directors referred to in subsection (3)(a)(i) may include a standing committee of the board of directors to which the power to authorize advances for expenses has been delegated, so long as (1) the committee was appointed by a majority vote of directors who were, at the time of appointment of the committee, not parties to the proceeding in connection with which the advance is being sought and (2) the advance is authorized by a majority vote of members of the committee who, at the time of the vote, are disinterested directors.

Under subsection (3)(a)(ii), which is available only if sub-section (3)(a)(i) is not available, the board's action must be taken in accordance with sections 820 or 821, as the case may be, and directors who are not disinterested directors may participate in the vote. Allowing non-

disinterested directors to participate in the authorization decision, if there is no or only one disinterested director, is a principle of prudence that is based on the concept that if there are not at least two disinterested directors, then it is preferable to return the power to make the decision to the full board (even though it includes non-disinterested directors) rather than to leave it with one disinterested director. An interested director should absent himself from any meeting considering a request for advance for expenses by him or the appointment of a committee to consider such a request.

Illustration 1: The board consists of 15 directors, four of whom are interested. Of the eleven disinterested directors, nine are present at the meeting at which the authorization is made or the committee is appointed.

Under subsection (3)(a)(i), a quorum is present and at least six of the nine disinterested directors present at the board meeting must authorize any advance for expenses because six is an absolute majority of the eleven disinterested directors. Alternatively, six of the nine disinterested directors present at the board meeting may appoint a committee of two to all (eleven) of the disinterested directors to decide whether to authorize the advance. Action by the committee requires an absolute majority of the members appointed.

Illustration 2: The board consists of 15 directors, 14 of whom are interested.

Subsection (3)(a)(i) is not available because the number of disinterested directors, one, is less than two. Accordingly, the decision must be made by the board under subsection (3)(a)(ii) (or, as is always permitted, by the shareholders under subsection (3)(b)).

Authorizations by shareholders rather than by directors are permitted by section 853(3)(b), but shares owned by or voted under the control of directors who at the time do not qualify as disinterested directors may not be voted on the authorizations of eligibility for indemnification. This does not affect rules governing the authorization as to the presence of a quorum at the meeting.

The fact that there has been an advance for expenses does not determine whether a director is entitled to indemnification. Repayment of any advance is required only if it is ultimately determined that the director did not meet the relevant standard of conduct in section 851. A proceeding will often terminate without a judicial or other determination of whether the director's conduct met that standard. Nevertheless, the board of directors should make, or cause to be made, an affirmative determination of entitlement to indemnification at the conclusion of the proceeding. This decision should be made in accordance with the procedures set forth in section 855.

If the corporation advances expenses to a director in connection with a derivative proceeding, the corporation must report that fact to the shareholders prior to their next meeting. See section 1621(1).

Judicial enforcement of rights granted by or pursuant to section 853 is specifically contemplated by section 854.

IDAHO REPORTER'S COMMENT

New Model Act § 853 is a much more detailed elaboration of the same subject covered in prior I.C. § 30-1-5(e). Specification is added, for example, with respect to the director's affirmation and undertaking and the corporation's authorization.

30-1-854. Court-ordered indemnification and advance for expenses. — (1) A director who is a party to a proceeding because he is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:

(a) Order indemnification if the court determines that the director is entitled to mandatory indemnification under section 30-1-852, Idaho Code;

(b) Order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by section 30-1-858(1), Idaho Code; or

(c) Order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable:

(i) To indemnify the director, or

(ii) To advance expenses to the director,

even if he has not met the relevant standard of conduct set forth in section 30-1-851(1), Idaho Code, failed to comply with section 30-1-853, Idaho Code, or was adjudged liable in a proceeding referred to in section 30-1-851(4)(a) or (4)(b), Idaho Code, but if he was adjudged so liable his indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

(2) If the court determines that the director is entitled to indemnification under subsection (1)(a) of this section or to indemnification or advance for expenses under subsection (1)(b) of this section, it shall also order the corporation to pay the director's reasonable expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under subsection (1)(c) of this section, it may also order the corporation to pay the director's reasonable expenses to obtain court-ordered indemnification or advance for expenses.

History.
I.C., § 30-1-854, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 854(1) provides for court-ordered indemnification in three situations:

(1) A director is entitled to mandatory indemnification under section 852. If so, the director may enforce that right by judicial proceeding.

(2) A director is entitled to indemnification or advance for expenses pursuant to a provision in the articles or bylaws, board or shareholder resolution or contract. If so, the director may enforce that right by judicial proceeding. To the extent that these rights are contractual, the corporation may have contractual defenses. If the corporation has contracted to indemnify a director to the fullest extent permitted by law, a court may, nevertheless, deny an advance for expenses if it determines that the director did not have, at the time he delivered the affirmation required by section 853(1)(a), a good faith belief that he met the relevant standard of conduct.

(3) A court in its discretion determines that it is fair and reasonable under all the relevant circumstances to order an advance for expenses or indemnification for the amount of a settlement or judgment (in addition to expenses), whether or not the director met the relevant standard of conduct in section 851 or is otherwise ineligible for indemnification. However, there are two exceptions: an adverse judgment in a derivative proceeding (section 851(4)(a)) and an adverse judgment in a proceeding charging receipt of an improper financial benefit (section 851(4)(b)), although in either case the court may order payment of expenses. Thus, with these exceptions, section 854(1)(c) permits a court to order indemnification for amounts paid in settlement of and expenses incurred in connection with a derivative proceeding or a proceeding charging receipt of an improper financial benefit. Section 854(1)(c) applies to (a) a situation in which a provision in the articles of incorporation, bylaws, resolution or contract obligates the corporation to indemnify or to advance expenses but the relevant standard of conduct has not been met and (b) a situation involving a permissive provision pursuant to which the board declines to exercise its authority to indemnify or to advance expenses. However, in determining whether indemnification or expense advance would be "fair and reasonable," a court should give appropriate deference to an informed decision of a board or committee made in good faith and based upon full information. Ordinarily, a court should not determine that it is "fair and reasonable" to order indemnification or expense advance where the director has not met conditions and procedures to which he agreed.

The discretionary authority of the court to order indemnification of a derivative proceeding settlement under section 854(1)(c) contrasts with the denial of similar authority under section 145(b) of the Delaware General Corporation Law. A director seeking court-ordered indemnification or expense advance under section 854(1)(c) must show that there are facts peculiar to his

situation that make it fair and reasonable to both the corporation and to the director to override an intracorporate declination or any otherwise applicable statutory prohibition against indemnification, e.g., sections 851(1) or (4).

Aside from the two exceptions noted above and other than the fairness and reasonableness requirement, there are no statutory outer limits on the court 's power to order indemnification under section 854(1)(c). In an appropriate case, a court may wish to refer to the provisions of section 202(2)(d) establishing the outer limits of a liability-limiting charter provision. It would be an extraordinary situation in which a court would want to provide indemnification going beyond the limits of section 202(2)(d), but if the court, as the independent decision-maker, finds that it is "fair and reasonable," then the court is permitted to do so. It should be emphasized again, however, that the director seeking indemnification must make a showing of fairness and reasonableness and that exercise of the power granted by section 854(1)(c) is committed to the court's discretion.

Among the factors a court may want to consider are the gravity of the offense, the financial impact upon the corporation, the occurrence of a change in control or, in the case of an advance for expenses, the inability of the director to finance his defense. A court may want to give special attention to certain other issues. First, has the corporation joined in the application to the court for indemnification or an advance for expenses? This factor may be particularly important where under section 851(4) indemnification is not permitted for an amount paid in settlement of a proceeding brought by or in the right of the corporation. Second, in a case where indemnification would have been available under section 851(1)(b) if the corporation had adopted a provision authorized by section 202(2)(e), was the decision to adopt such a provision presented to and rejected by the shareholders and, if not, would exculpation of the director's conduct have resulted under a section 202(2)(d) provision? Third, in connection with considering indemnification for expenses under section 851(4)(b) in a proceeding in which a director was adjudged liable for receiving a financial benefit to which he was not entitled, was such financial benefit insubstantial--particularly in relation to the other aspects of the transaction involved--and what was the degree of the director's involvement in the transaction and the decision to participate?

Under section 854(2), if a director successfully sues to enforce his right to indemnification of expenses under subsection (1)(a) or to indemnification or advance for expenses under subsection (1)(b), then the court must order the corporation to pay the director's expenses in the enforcement proceeding. However, if a director successfully sues for indemnification or advance for expenses under subsection (1)(c), then the court may (but is not required to) order the corporation to pay the director's expenses in the proceeding under subsection (1)(c). The basis for the distinction is that the corporation breached its obligation in the first two cases but not in the third.

Application for indemnification under section 854 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal proceeding who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal proceeding or bring an action against the corporation in another forum.

A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct of section 830. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is deserving of receiving it under section 854.

As provided in section 858(3), a corporation may limit the rights of a director under section 854 by a provision in its articles of incorporation. In the absence of such a provision, the court has general power to exercise the authority granted under this section.

If the corporation provides indemnification or advances expenses to a director in connection with a derivative proceeding, the corporation must report that fact to the shareholders prior to their next meeting. See section 1621(1).

IDAHO REPORTER'S COMMENT

This new Model Act § 854 goes beyond prior I.C. § 30-1-5 in specifying a cause of action for directors to judicially enforce indemnification and/or advance for expenses. Both the new section itself and the ABA's OFFICIAL COMMENT seem potentially useful to courts in an area that might be new to them, especially here in Idaho with our relative paucity of corporate litigation and precedent.

30-1-855. Determination and authorization of indemnification. — (1) A corporation may not indemnify a director under section 30-1-851,

Idaho Code, unless authorized for a specific proceeding after a determination has been made that indemnification of the director is permissible because he has met the relevant standard of conduct set forth in section 30-1-851, Idaho Code.

(2) The determination shall be made:

(a) If there are two (2) or more disinterested directors, by the board of directors by a majority vote of all the disinterested directors, (a majority of whom shall for such purpose constitute a quorum), or by a majority of the members of a committee of two (2) or more disinterested directors appointed by such a vote;

(b) By special legal counsel:

(i) Selected in the manner prescribed in paragraph (a) of this subsection; or

(ii) If there are fewer than two (2) disinterested directors, selected by the board of directors (in which selection directors who do not qualify as disinterested directors may participate); or

(c) By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the determination.

(3) Authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two (2) disinterested directors or if the determination is made by special legal counsel, authorization of indemnification shall be made by those entitled under subsection (2)(b)(ii) of this section to select special legal counsel.

History.

I.C., § 30-1-855, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 855 provides the method for determining whether a corporation should indemnify a director under section 851. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances the person seeking indemnification has met the relevant standard of conduct under section 851 and is therefore eligible for indemnification. This decision may be made by the individuals or groups described in section 855(2). In addition, after a favorable 'determination' has been made, the corporation must decide whether to "authorize" indemnification except to the extent that an obligatory provision under section 858(1) is applicable. This decision includes a review of the reasonableness of the expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the corporation. While special legal counsel may make the "determination" of eligibility for indemnification, counsel may not "authorize" the indemnification. The existence of an obligation to "authorize" indemnification is subject to the existence of an obligatory provision under section 858(1).

Section 855(2) establishes procedures for selecting the person or persons who will make the determination of permissibility of indemnification. As indicated in the Official Comment to section 853(3), the committee referred to in subsection (2)(a) may include a standing committee of the board to which the power to determine whether to indemnify a director has been delegated so long as the appointment and composition of the committee members comply with subsection (2)(a). In selecting special legal counsel under subsection (2)(b), directors who are parties to the proceeding may participate in the decision if there are insufficient disinterested directors to satisfy subsection (2)(a). Directors who do not qualify as disinterested directors may also participate in the decision to "authorize" indemnification on the basis of a favorable

"determination" if necessary to permit action by the board of directors. The authorization of indemnification is the decision that results in payment of any amounts to be indemnified. This limited participation of interested directors in the authorization decision is justified by the principle of necessity.

Under subsection (2)(a), the vote required when the disinterested directors act as a group is an absolute majority of their number. A majority of the disinterested directors constitutes a quorum for board action for this purpose.

If there are not at least two disinterested directors, then the determination of entitlement to indemnification must be made by special legal counsel or by the shareholders.

Legal counsel authorized to make the required determination is referred to as "special legal counsel." In earlier versions of the Model Act, and in the statutes of many states, reference is made to "independent" legal counsel. The word "special" is felt to be more descriptive of the role to be performed; it is intended that the counsel selected should be independent in accordance with governing legal precepts. "Special legal counsel" normally should be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific occasion, and should not be or have been either inside counsel or regular outside counsel to the corporation. Special legal counsel should also not have any familial, financial or other relationship with any of those seeking indemnification that would, in the circumstances, reasonably be expected to exert an influence on counsel in making the determination. It is important that the process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute.

Determinations by shareholders rather than by directors or special legal counsel are permitted by section 855(2)(c), but shares owned by or voted under the control of directors who at the time do not qualify as disinterested directors may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination as to the presence of a quorum at the meeting.

Section 855 is subject to section 858(1), which permits the corporation to obligate itself in advance to provide indemnification or to advance expenses.

IDAHO REPORTER'S COMMENT

New Model Act § 855 is a more detailed elaboration of the ground covered in prior I.C. § 30-1-5(d) on the procedures for "determining" eligibility for and then "authorizing" indemnification. The additional specification seems to be a constructive addition to the prior law.

30-1-856. Officers. — (1) A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to a proceeding because he is an officer of the corporation.

(a) To the same extent as a director; and

(b) If he is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for:

(i) Liability in connection with a proceeding by or in the right of the corporation other than for reasonable expenses incurred in connection with the proceeding; or

(ii) Liability arising out of conduct that constitutes:

(A) Receipt by him of a financial benefit to which he is not entitled,

(B) An intentional infliction of harm on the corporation or the shareholders, or

(C) An intentional violation of criminal law.

(2) The provisions of subsection (1)(b) of this section shall apply to an officer who is also a director if the basis on which he is made a party to the proceeding is an act or omission solely as an officer.

(3) An officer of a corporation who is not a director is entitled to mandatory indemnification under section 30-1-852, Idaho Code, and may

apply to a court under section 30-1-854, Idaho Code, for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

History.
I.C., § 30-1-856, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 856 correlates the general legal principles relating to the indemnification of officers of the corporation with the limitations on indemnification in sections 850 through 859. This correlation may be summarized in general terms as follows:

(1) An officer of a corporation who is *not* a director may be indemnified by the corporation on a discretionary basis to the same extent as though he were a director, and, in addition, may have additional indemnification rights apart from sections 850 through 859, but the outer limits of such rights are specified. (See section 856(1)(b) and (3).)

(2) An officer who is *also* a director of the corporation is entitled to the indemnification rights of a director and of an officer who is not a director (see preceding paragraph) if his conduct that is the subject of the proceeding was solely in his capacity as an officer. (See section 856(2).)

(3) An *officer* of a corporation who is not a director has the right of mandatory indemnification granted to directors under section 852 and the right to apply for court-ordered indemnification under section 854. (See section 856(3).)

Section 856 does not deal with indemnification of employees and agents because the concerns of self-dealing that arise when directors provide for their own indemnification and expense advance (and sometimes for senior executive officers) are not present when directors (or officers) provide for indemnification and expense advance for employees and agents who are not directors or officers. Moreover, the rights of employees and agents to indemnification and advance for expenses derive from principles of agency, the doctrine of respondeat superior, collective bargaining or other contractual arrangements rather than from a corporation statute. It would be presumptuous for a corporation statute to seek to limit the indemnification bargain that a corporation may wish to make with those it hires or retains. The same standard applicable to directors and officers may not be appropriate for office workers and hazardous waste workers, brokers and custodians, engineers and farm workers. None of their roles or responsibilities are prescribed by the Model Act.

Section 302 grants broad powers to corporations, including powers to make contracts, appoint and fix the compensation of employees and agents and to make payments furthering the business and affairs of the corporation. Many corporations provide for the exercise of these powers in the same provisions in the articles, bylaws or otherwise in which they provide for expense advance and indemnification for directors and officers.

Indemnification may also be provided to protect employees or agents from liabilities incurred while serving at a corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit venture.

Although employees and agents are not covered by sections 850 through 859, the principles and procedures set forth in these sections for indemnification and advance for expenses for directors and officers may be helpful to counsel and courts in dealing with indemnification and expense advance for employees and agents.

Careful consideration should be given to extending mandatory maximum indemnification and expense advance to employees and agents. The same considerations that may favor mandatory maximum indemnification for directors and officers — e.g., encouraging qualified individuals to serve — may not be present in the cases of employees and agents. Many corporations may prefer to retain the discretion to decide, on a case-by-case basis, whether to indemnify and advance expenses to employees and agents (and perhaps even officers, especially non-executive officers) rather than binding themselves in advance to do so.

1. OFFICERS WHO ARE NOT DIRECTORS. While section 856 does not prescribe the standards governing the rights of officers to indemnification, subsection (1) does set outer limits beyond which the corporation may not indemnify. These outer limits for officers (see subsection (1) (b)) are substantially the same as the outer limits on the corporation's power to indemnify directors: (i) in a proceeding by or in the right of the corporation, indemnification is not allowed other than for reasonable expenses incurred in connection therewith and (ii) in any proceeding, indemnification is not allowed in those situations in which directors' liability to the corporation

or its shareholders could not be eliminated by a provision included in the articles pursuant to section 202(2)(d), i.e., where there has been receipt of a financial benefit to which he is not entitled, intentional infliction of harm on the corporation or shareholders or intentional violation of criminal law. Since officers are held to substantially the same standards of conduct as directors (see section 842), there does not appear to be any reasoned basis for granting officers greater indemnification rights as a substantive matter. Procedurally, however, there is an important difference. To permit greater flexibility, officers may be indemnified (within the above-mentioned outer limits) with respect to conduct that does not meet the standards set by section 851(1)(a) simply by authorization of the board of directors, whereas directors' indemnification can reach beyond those standards, as contemplated by section 851 (1)(b), only with a shareholder-approved provision included in the articles pursuant to section 202 (2)(e). This procedural difference reflects the reduced risk of self-dealing as to officers.

Section 856(3) grants non-director officers the same rights to mandatory indemnification under section 852 and to apply to a court for indemnification under section 854 as are granted to directors. Since their substantive rights to indemnification are essentially the same as those of directors, it is appropriate to grant officers the same affirmative procedural rights to judicial relief as are provided to directors. The broad authority in section 856(1)(b) to grant indemnification may be limited by appropriate provisions in the articles of incorporation. See section 858(3).

2. OFFICERS WHO ARE ALSO DIRECTORS. Subsection (2) provides, in effect, that an officer of the corporation who is also a director is subject to the same standards of indemnification as other directors and cannot avail himself of the provisions of subsection (1) unless he can establish that the act or omission that is the subject of the proceeding was committed solely in his capacity as officer. Thus, a vice president for sales who is also a director and whose actions failed to meet section 851(1) standards could be indemnified provided that his conduct was within the outer limits of subsection (1)(b) and involved only his officer capacity.

This more flexible approach for situations where the individual is not acting as a director seems appropriate as a matter of fairness. There are many instances where officers who also serve as directors assume responsibilities and take actions in their non-director capacities. It is hard to justify a denial of indemnification to an officer who failed to meet a standard applicable only to directors when the officer can establish that he did not act as a director. Nor are there likely to be complications or difficulties because some directors are treated differently than others where the high burden of proof — solely as officer — is met. Obviously, the burden will be especially difficult to meet where the roles of officer and director are closely intertwined, as is often the case with a chief executive officer.

For a director-officer to be indemnified under section 851 for conduct in his capacity as a director when he has not satisfied the standards of section 851(1), a provision in the articles under section 202(2)(e) is required. If such a provision is included in the articles, the standards for indemnification are those specified in section 202(2)(e). For a director-officer to be indemnified for conduct solely in his capacity as an officer, even though the director-officer has not satisfied the standards of section 856(1), only a resolution of the board authorizing such indemnification is required, rather than a provision in the articles. If such a resolution is adopted, the standards for indemnification are those specified in subsection (1)(b). However, when a director-officer seeks indemnification or expense advance under subsections (2) and (1)(b) on the basis of having acted solely in his capacity as an officer, indemnification or expense advance must be approved through the same procedures as set forth in sections 855 or 853(3), as the case may be, for approval of indemnification or expense advance for a director when acting in his capacity as a director.

IDAHO REPORTER'S COMMENT

Separate treatment of indemnification of officers, while limiting the basic statutory scheme to indemnification of directors, is at first glance a striking feature of the new Model Act. But expenses involved in actions against non-director officers, employees and agents can almost always be indemnified by the corporation under general principles of agency law, while there are no consistent or settled non-statutory theories for indemnification of directors. So it does make sense to focus the statute on indemnification of directors.

Much of new Model Act § 856 may be redundant of common law agency power, but the distinction between non-director officers and officers who are also directors is worth noting. In general, of course, the inherent power to indemnify action taken as an officer is broader than the statutory power to indemnify action taken as a director.

Individual corporations may also provide in their bylaws for the indemnification of non-director employees. See section 30-1-858(5), below.

30-1-857. Insurance. — A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity, against liability asserted against or incurred by him in that capacity or arising from his status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to him against the same liability under this part; provided that banks, savings and loan associations and credit unions chartered under the laws of the state of Idaho may provide indemnification only by insurance.

History.

I.C., § 30-1-857, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 857 authorizes a corporation to purchase and maintain insurance on behalf of directors and officers against liabilities imposed on them by reason of actions in their official capacity, or their status as such, or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which a corporation is entitled to indemnify under sections 850 through 859. This insurance, usually referred to as "D&O Liability Insurance," provides protection to directors and officers in addition to the rights of indemnification created by or pursuant to sections 850 through 859 (as well as typically protecting the individual insured against the corporation's failure to pay indemnification required or permitted by these sections) and provides a source of reimbursement for corporations which indemnify directors and others for conduct covered by the insurance. On the other hand, policies typically do not cover uninsurable matters, such as actions involving dishonesty, self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. Johnston, *"Corporate Indemnification and Liability Insurance for Directors and Officers,"* 33 Bus. Law. 1993, 2024-29 (1978). See also Knepper & Bailey, *Liability of Corporate Officers and Directors* § 21.07 (4th ed. 1988).

Although this section does not include employees and agents for the reasons stated in the Official Comment to section 856, the corporation has the power under section 302 to purchase and maintain insurance on their behalf. This power is confirmed in section 858(4).

This section is not intended to set the outer limits on the type of insurance which a corporation may maintain or the persons to be covered. Rather, it is included to remove "any doubt as to the power to carry insurance and to maintain it on behalf of directors, officers, employees and agents." Sebring, *"Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others,"* 23 Bus. Law. 95, 106 (1967).

IDAHO REPORTER'S COMMENT

New Model Act § 857 is worded slightly differently than prior I.C. § 30-1-5(g) but involves no substantive changes.

It should be noted that prior § 5(g) ended with the following apparently unique proviso: "provided that banks, savings and loan associations and credit unions chartered under the laws of the State of Idaho may provide indemnification only by insurance." This proviso was held over from prior law in connection with the 1979 revision, and has been added to the Official Text in the 1997 revision.

30-1-858. Variation by corporate action — Application of indemnification provisions. — (1) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution approved by its board of directors or shareholders, obligate itself in advance of the act or omission

giving rise to a proceeding to provide indemnification in accordance with section 30-1-851, Idaho Code, or advance funds to pay for or reimburse expenses in accordance with section 30-1-853, Idaho Code. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in section 30-1-853(3), Idaho Code, and in section 30-1-855(3), Idaho Code. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with section 30-1-853, Idaho Code, to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(2) Any provision pursuant to subsection (1) of this section shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by section 30-18-206, Idaho Code, or if excluded by said section pursuant to section 30-18-110, Idaho Code, by section 30-1-1107(1)(d), Idaho Code.

(3) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part, other than the rights to mandatory indemnification under section 30-1-852, Idaho Code, and to court-ordered indemnification and advance for expenses under section 30-1-854, Idaho Code.

(4) Sections 30-1-850 through 30-1-859, Idaho Code, do not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his appearance as a witness in a proceeding at a time when he is not a party.

(5) Sections 30-1-850 through 30-1-859, Idaho Code, do not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of an employee or agent.

History.

I.C., § 30-1-858, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 28, p. 907; am. 2007, ch. 116, § 2, p. 333.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 116, inserted "by section 30-18-206, Idaho Code, or if excluded by said section pursuant to section 30-18-110, Idaho Code" near the end of subsection (1).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

ABA OFFICIAL COMMENT

Section 858(1) authorizes a corporation to make obligatory the permissive provisions of sections 851 and 853 in advance of the conduct giving rise to the request for assistance. Many corporations have adopted such provisions, often with shareholder approval. An obligatory

provision satisfies the requirements for authorization in subsection (3) of sections 853 and 855, but compliance would still be required with subsections (1) and (2) of these sections.

Section 858(1) further provides that a provision requiring indemnification to the fullest extent permitted by law shall be deemed, absent an express statement to the contrary, to include an obligation to advance expenses under section 853. This provision of the statute is intended to avoid a decision such as that of the Delaware Supreme Court in *Advanced Mining Systems, Inc. v. Fricke,* 623 A.2d 82 (Del. 1992). If a corporation provides for obligatory indemnification and not for obligatory advance for expenses, the provision should be reviewed to ensure that it properly reflects the intent in light of the second sentence of section 858(1). Also, a corporation should consider whether obligatory expense advance is intended for direct suits by the corporation as well as for derivative suits by shareholders in the right of the corporation. In the former case, assuming compliance with subsections (1) and (2) of section 853, the corporation could be required to fund the defense of a defendant director even where the board of directors has already concluded that he has engaged in significant wrongdoing. See Official Comment to section 853.

Section 858(2) provides that an obligatory indemnification provision as authorized by subsection (1) does not, unless specific provision is made to the contrary, bind the corporation with respect to a predecessor. An obligatory indemnification provision of a predecessor is treated as a liability (to the extent it is one) under section 1106(1)(c), which governs the effect of a merger.

Section 858(3) permits a corporation to limit the right of the corporation to indemnify or advance expenses by a provision in its articles of incorporation. As provided in section 1009, no such limitation will affect rights in existence when the provision becomes effective pursuant to section 123.

Section 858(4) makes clear that sections 851 through 857 deal only with actual or threatened defendants or respondents in a proceeding, and that expenses incurred by a director in connection with appearance as a witness may be indemnified without regard to the limitations of sections 851 through 857. Indeed, most of the standards described in sections 851 and 854(1) by their own terms can have no meaningful application to a director whose only connection with a proceeding is that he has been called as a witness.

Sections 850 through 859 do not regulate the power of the corporation to indemnify or advance expenses to employees and agents. That subject is governed by the law of agency and related principles and frequently by contractual arrangements between the corporation and the employee or agent. Section 858(5) makes clear that, while indemnification, advance for expenses and insurance for employees and agents are beyond the scope of sections 850 through 859, the elaboration in these sections of standards and procedures for indemnification, expense advance and insurance for directors and officers is not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to or purchase and maintain insurance for employees and agents under section 302 or otherwise.

IDAHO REPORTER'S COMMENT

New Model Act § 858 seems sort of a "catchall procedural" section that (1) provides some more detailed elaboration on the matters covered in prior I.C. § 30-1-5(f) and (h), (2) specifies that articles of incorporation can limit any rights under sections 850 through 859, (3) clarifies that reimbursement for witness expense is a separate matter and (4) iterates that these provisions have no effect on a corporation's common law-agency law power to take care of employees and other agents.

30-1-859. Exclusivity. — A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by sections 30-1-850 through 30-1-859, Idaho Code.

History.

I.C., § 30-1-859, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Sections 851 through 858 are the exclusive source for the power of a corporation to indemnify or advance expenses to a director or an officer.

Section 859 does not preclude provisions in articles of incorporation, bylaws, resolutions, or

contracts designed to provide procedural machinery in addition to (but not inconsistent with) that provided by sections 850 through 858. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advance for expenses or to cooperate in the procedural steps required to obtain a judicial determination under section 854.

Introduction to Sections 860 through 863.

Introductory Comment. The common law, drawing by analogy on the fiduciary principles of the law of trusts, initially took the position that any transaction between X Co. and a director of X Co. was contaminated by the director's conflicting interest, that the transaction was null and void or voidable and, at least by implication, that the interested director who benefited from the transaction could be required to disgorge any profits and be held liable for any damages. In time, this rule was perceived to be demonstrably unworkable in the real business world and contrary to the best interests of the corporation. Accordingly, some courts modified their initial rigidity and, in addition, corrective legislation was enacted as a part of the business corporation acts.

The new statutory provisions on directors' conflicting interest transactions allowed the courts to develop the substantive content of the duty of loyalty owed by agents to their principals, by employees to their employers, and by directors to their corporations. The statutes themselves concentrated on creating procedures by which interest-conflict transactions between corporations and their directors could be salvaged while, at the same time, corporations and their shareholders could be protected against unfair dealing by self-aggrandizing directors. Section 41 of the 1969 Model Act [prior I.C. § 30-1-41] was such a procedural provision, and so was its successor, section 8.31 of the Model Act.

The replacement for section 8.31, now embodied as sections 860 through 863 of the new Model Act, is of the same procedural character. But these new sections have some important new features.

1. PURPOSES AND SPECIAL CHARACTERISTICS OF SECTIONS 860 THROUGH 863. Predecessor provisions to sections 860 through 863 were sweeping and generalized in character. These new sections are not. Their key objectives are to increase predictability and to enhance practical administrability. To that end, the new sections spell out a safe harbor procedure more meticulously than their predecessors. To the same end, the new sections go further. Earlier statutes left entirely to judicial interpretation — and to the guess of corporate counsel — the central question as to what does and what does not constitute a conflicting interest of a director. Great uncertainty has arisen as to the scope of that concept. Sections 860 through 863 take the new step of spelling out a practical working definition of 'conflicting interest' and declare that definition to be exclusive. Circumstances that fall outside the statutory definition of conflicting interest cannot constitute the basis for an attack on a transaction on grounds of a director's interest conflict, although they may, of course, afford basis for legal attack on some other ground. Finally, to a greater degree than its predecessors, the new sections specify when judicial intervention is appropriate and when it is not.

In sum, sections 860 through 863 are new in that they adopt a "bright-line" statutory approach. An inevitable feature of any bright-line statute or regulation is that, no matter where the line may be set, some situations that fall outside the line will closely resemble other situations that fall inside it. Some observers find that outcome anomalous and argue that a bright-line approach is inferior to a statement of broad principles. But the legislative draftsman who chooses to suppress marginal anomalies by resorting to generalized statements of principle will pay a cost in terms of predictability. The choice between these two drafting approaches is a matter of judgment; an experienced legislative draftsman would never write a bright-line constitutional "due process" clause, nor would he provide, in a business corporation act, for "a reasonable period" of notice for a shareholders' meeting.

For a number of reasons, sections 860 through 863 are deliberately weighted towards bright-line specificity and predictability. That there will be imaginable situations at the margin that are similar but yield different results can be anticipated and is accepted.

One consideration arguing for the bright-line approach in sections 860 through 863 is that the existing case law governing interest conflicts of directors is in a state of unhealthy uncertainty, reflecting differing judicial attitudes toward and varying levels of comprehension concerning the subject. Equal uncertainty surrounds the working of the procedural machinery for dealing with transactions that involve a director' s conflicting interest.

A second consideration arguing for a bright-line approach is that the fundamental perspective of sections 860 through 863 is prospective. In the real business world, a decision must be made now whether or not to proceed with the transaction and legal counsel's opinion must be delivered now as to whether clearance procedures are available and have been complied with. The business executive can accept either "yes" or "no" as an answer but he cannot effectively

function in an environment in which the law, lawyers, or the courts say, "Go ahead and I will tell you later — perhaps years later — whether the transaction is vulnerable to attack."

Further, the essential character of interest conflict is often, unfortunately, misunderstood by the public and the media (and sometimes misunderstood, too, by lawyers and judges). Interest conflicts can and often do lead to baneful acts. The law regulates interest conflict transactions because experience shows that people do often yield to the temptation to advance their self-interests and, if they do, other people may be injured. That contingent fear is sufficient reason to warrant caution and to apply special standards and procedures to interest conflict transactions.

Nonetheless, it is important to keep firmly in mind that it is a contingent risk we are dealing with — that an interest conflict is not in itself a crime or a tort or necessarily injurious to others. Contrary to much popular usage, having a "conflict of interest" is not something one is "guilty of"; it is simply a state of affairs. Indeed, in many situations, the corporation and the shareholders may secure major benefits from a transaction despite the presence of a director's conflicting interest. Further, while history is replete with selfish acts, it is also oddly counterpointed by numberless acts taken contrary to self interest.

And, as an additional consideration, while conflicting interests surely carry potential danger, other important social values, such as economic efficiency, predictability and business finality are also at stake and should be accorded heavy countering weight in the law.

One last point. Even if one were to disregard these considerations and draft statutory language governing directors' interest conflicts in the most generalized form in an effort to catch the last malefactor, "anomalous" results still would not be avoided. One reason is that generalized drafting invites varying judicial and practitioner interpretation, as has in fact occurred in the cases on director's conflicts of interest. But the ultimate unresolvable problem in seeking to regulate interest conflicts is that human beings are motivated by unimaginably varied and indeterminable mixes of ambitions, likes, dislikes, and biases. At the end of the day, who can say in respect of any matter that a particular director was, in a deeper sense, "disinterested" in a particular transaction and acted objectively on the merits? In regulating the conflicting interests of directors, the courts (and pertinent statutes) have limited inquiry to the financial interests of the director and his immediate family and associates. That is the wise course and, indeed, the only practical course. But in adopting that course, one obviously excludes a large fraction of the interests that actually drive the actions of human beings. Thus, the law may preclude a director from voting on a transaction in which he has an economic interest even if, given his resources, the amount at stake will have no real impact upon his decision making, yet the law does not prohibit the same director from voting on a transaction which significantly benefits a religious institution to whose creed he is deeply devoted and that guides his life. Such deeper anomalies cannot be eradicated and the law should not seek to eradicate them. But it is worthwhile to be reminded that they exist, for in this field a degree of anomaly is a condition that must be accepted and lived with.

2. SCOPE OF SECTIONS 860 THROUGH 863. The focus of sections 860 through 863 is sharply defined and limited.

First, the sections are targeted on legal challenges based on interest conflicts only. These sections do not undertake to define, regulate, or provide any form of procedure regarding other possible claims. For example, sections 860 through 863 do not address a claim that a controlling shareholder has violated a duty owed to the corporation or minority shareholders.

Second, the sections are applicable only when there is a "transaction" by or with the corporation. For purposes of these sections, "transaction" generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests — not simply a unilateral action by the corporation but rather a "deal." See the discussion regarding "transaction" in the Official Comment to section 8.60(2). Whether safe harbor procedures of some kind might be available to the director and the corporation with respect to non-transactional matters is discussed below at division 4 of this Introductory Comment.

Third, sections 860 through 863 deal with directors only. [The same was true of predecessor section 8.31 and section 41 of the 1969 Model Act (prior I.C. § 30-1-41).] Conflicts of interest of non-director officers or employees of the corporation are dealt with by the law of agency prescribing loyalty of agent to principal. Moreover, most large corporations today have internal regulations governing the business conduct of all personnel, including loyalty to the employer and avoidance of conflicting personal interests. A corporate employee can also deal with a personal conflict situation by going to his supervisor. Thus the conflict of interest problems of all corporate personnel except directors can be satisfactorily handled by general law, internal rules, and personnel procedures. For the directors, however — those who are ultimately responsible for the corporation — special provision in the business corporation statute is required.

Fourth, it is important to stress that the voting procedures and standards prescribed in sections 860 through 863 deal solely with the element of the director's conflicting interest. A transaction that receives a directors' or shareholders' vote that complies with these sections may well fail to achieve a different vote or quorum that may be requisite for substantive approval of the transaction under other applicable statutory provisions or under the articles of incorporation, and vice versa. (Under the Model Act, latitude is granted for setting higher voting requirements and different quorum requirements in the articles of incorporation. See sections 727 and 202(2)(b).

Fifth, a few corporate transactions or arrangements in which directors inherently have a special personal interest are of a unique character and are regulated by special procedural provisions of the Act. See, e.g., sections 851 and 852 dealing with indemnification arrangements. Any corporate transactions or arrangements affecting directors that are governed by such regulatory sections of the Act are not governed by sections 860 through 863.

Sections 860 through 863 contemplate deletion of former Model Act section 8.32 dealing specially with loans to directors; a loan to a director is simply a subspecies of directors' conflicting interest transactions and is procedurally governed by sections 860 through 863. See the Note on Fair Transactions in the Official Comment to section 861(2).

3. STRUCTURE OF SECTIONS 860 THROUGH 863. The skeleton of sections 860 through 863 has only four parts. Definitions are in section 860. Section 861 prescribes what a court may or may not do in various situations. Section 862 prescribes procedures for action by boards of directors regarding a director's conflicting interest transaction. Section 863 prescribes corresponding procedures for shareholders. Thus, the most important operative section is section 861.

4. NON-TRANSACTIONAL SITUATIONS INVOLVING INTEREST CONFLICTS. Many situations arise in which a director's personal economic interest is or may be adverse to the economic interest of the corporation, but which do not entail a "transaction" by or with the corporation.

Corporate opportunity.

An authoritative succinct statement of the corporate opportunity doctrine is that "the corporation has a prior claim to opportunities of business and profit which may be regarded as incident to its business ...." (*Ballantine on Corporations*, 79). Whether a court will declare a "corporate opportunity" to have been presented has always been wholly dependent on the facts of the case and often difficult to predict. And the scope of the "incident to its business" concept has become even more murky in an era in which it is not unknown for a manufacturer of electrical equipment to become an investment bank, or a builder of concert pianos to become an insurance underwriter. If, however, one assumes a situation in which the circumstances presented are such that all would agree that it constitutes a corporate opportunity, to what extent are the procedures provided for in sections 860 through 863 relevant?

Obviously, these sections do not apply by their terms to such a situation since no transaction between the corporation and the director is involved. Yet, on analysis, a director's conflicting interest transaction and a director's corporate opportunity are fundamentally alike. If at the same board meeting the transaction and the opportunity are brought before the board with adequate disclosure of the relevant facts about each and the board, by action of disinterested directors, votes to enter into the transaction and votes to decline the opportunity (which the director then takes up), the integrity of the board's informed decisional process has been satisfied in both instances. The legal outcome should, therefore, be the same in both instances; i.e., the board's action should afford safe harbor protection against later attack.

The procedures of sections 860 through 863, specifically designed for transactions, cannot simply be mechanically transferred and applied to the corporate opportunity situation, however. The reason is that the rules declaring which directors are legally qualified to vote are structurally dependent upon the sections' basic definition of "conflicting interest" — a definition that has no bearing on a corporate opportunity situation. Thus, the board will have to derive out of general common law the principles for determining which directors are, and which ones are not, to be considered qualified for this purpose. That question will usually not be difficult to resolve, but it is one that is not answered by sections 860 through 863 themselves. For the corporate opportunity situation, therefore, the sections' procedure can be utilized, except for one missing component that in most cases can be readily supplied in the first instance by the board, and if challenged, ultimately determined by the court.

Other situations.

Many other kinds of situations can give rise to a clash of economic interest between a director and the corporation. For example, a director's personal financial interests can be impacted by a non-transactional policy decision of the board — for example where it decides to establish a divisional headquarters in the director's small hometown. In other situations, simple inaction by a board might work to a director's personal advantage. Or a flow of ongoing business

relationships between a director and his corporation may, without centering upon any discrete "transaction," raise questions of possible favoritism, unfair dealing, or undue influence. If a director wishes to engage in business activity that directly competes with the corporation's own business, his economic interest in the competing activity ordinarily will conflict with the best interests of the corporation and put in issue the breach of the director's duties to the corporation. Obvious interest-clash can also arise out of a director's personal appropriation of corporate assets or improper use of corporate proprietary or inside information.

The circumstances in which such non-transactional conflict situations should be brought to the board or shareholders for clearance, and the legal effects, if any, of such clearance, are matters for development under the common law and lie outside the ambit of sections 860 through 863. While these non-transactional situations are unaffected one way or the other by the provisions, a court may well recognize the sections 860 through 863 procedures as a useful analogy for dealing with such situations. Where similar procedures are followed in such situations, the court may, in its discretion, accord to them the same or similar effect to that provided by sections 860 through 863.

Note

In the Official Comments to sections 860 through 863, the director who has a conflicting interest is for convenience referred to as "the director" or "D," and the corporation of which he is a director is referred to as "the corporation" or "X Co." Another corporation dealing with X Co. is referred to as "Y Co."

IDAHO REPORTER'S COMMENT

This statutory exclusivity does seem a conceptually important change as compared to prior I.C. § 30-1- 5(f). Practically, however, the change doesn't seem as important because (1) the new statute is so much more comprehensive and (2) non-statutory powers in this area are limited to non-director agency functions.

30-1-860. Definitions. — For purposes of sections 30-1-860 through 30-1-863, Idaho Code:

(1) "Conflicting interest" with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, if:

(a) Whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that he or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction; or

(b) The transaction is brought, or is of such character and significance to the corporation that it would in the normal course be brought, before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction:

(i) An entity, other than the corporation, of which the director is a director, general partner, agent or employee,

(ii) A person that controls one (1) or more of the entities specified in subparagraph (i) of this paragraph or an entity that is controlled by, or

is under common control with, one (1) or more of the entities specified in subparagraph (i) of this paragraph, or

(iii) An individual who is a general partner, principal or employer of the director.

(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, respecting which a director of the corporation has a conflicting interest.

(3) "Related person" of a director means:

(a) The spouse, or a parent or sibling thereof, of the director, or a child, grandchild, sibling, parent, or spouse of any thereof, of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified in this paragraph (a) is a substantial beneficiary; or

(b) A trust, estate, incompetent, conservatee or minor of which the director is a fiduciary.

(4) "Required disclosure" means disclosure by the director who has a conflicting interest of:

(a) The existence and nature of his conflicting interest; and

(b) All facts known to him respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment about whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the corporation, or its subsidiary or the entity in which it has a controlling interest, becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage.

History.

I.C., § 30-1-860, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The definitions set forth in section 860 apply to sections 861 through 863 only and have no application elsewhere in the Model Act.

1. CONFLICTING INTEREST. The definition of conflicting interest requires that the director know of the transaction. More than that, it requires that he know of his interest conflict at the time of the corporation's commitment to the transaction. Absent that knowledge by the director, the risk to the corporation addressed by sections 860 through 863 is not present. In a corporation of significant size, routine transactions in the ordinary course of business, involving decision making at lower management levels, will usually not be known to the director and will thus be excluded by the "knowledge" criterion in the definition.

The term "conflicting interest" as defined for sections 860 through 863 is never abstract or freestanding; its use must always be linked to a particular director, to a particular transaction and to a particular corporation.

The definition of "conflicting interest" is exclusive. An interest of a director is a conflicting interest if and only if it meets the requirements of subsection (1).

D can have a conflicting interest in only three ways.

First, a conflicting interest of D will obviously arise if the transaction is between D and X Co.

A conflicting interest will also arise under subsection (1)(a) if D is not a party but has a beneficial financial interest in the transaction that is separate from his interest as a director or shareholder and is of such significance to the director that it would reasonably be expected to exert an influence on his judgment if he were called upon to vote on the matter. The personal economic stake of the director must be in or closely linked to the transaction — that is, his gain must hinge directly on the transaction itself. A contingent or remote gain (such as a future reduction in tax rates in the local community) is not enough to give rise to a conflicting interest under subsection (1)(a). See the discussion of "transaction" under the Official Comment to subsection (2).

If Y Co. is a party to or interested in the transaction with X Co. and Y Co. is somehow linked to D, the matter is in general governed by subsection (1)(b). But D's economic interest in Y Co. could be so substantial and the impact of the transaction so important to Y Co. that D could also have a conflicting interest under subsection (1)(a).

Note that the basic standard set by subsection (1)(a) and throughout sections 860 through 863 — "would reasonably be expected to exert an influence" — is an objective, not a subjective, criterion.

Second, a conflicting interest of D can arise under subsection (1)(a) from the involvement in the transaction of a "related person" of D. "Related person" is defined in subsection (3).

Third, in limited circumstances, subsequently discussed, a conflicting interest of D can arise through the economic involvement of certain other persons specified in subsection (1)(b). These are any entity (other than X Co.) of which the director is a director, general partner, agent, or employee; a person that controls, or an entity that is controlled by, or is under common control with one or more of the entities specified in the preceding clause; and any individual who is a general partner, principal, or employer of D.

The terms "principal" and "employer" as used in subsection (1)(b) are not separately defined but should be interpreted sensibly in the context of the purpose of the subsection. The key question is whether D is, by force of an overt or covert tie to an employer or a principal who has a significant stake in the outcome of the transaction, beholden to act in the interest of that outside employer or principal rather than in the interest of X Co.

The "would reasonably be expected" criterion of subsection (1)(a) applies also to subsection (1)(b).

Any director will, of course, have countless relationships and linkages to persons and institutions other than those specified in subsection (1)(b) and those defined in subdivision (3) to be related persons. But, for the reasons outlined in the Introduction, the subcategories of persons encompassed by subsection (1)(b) are expressly intended to be exclusive and to cover the field for purposes of sections 860 through 863 and particularly section 861(1). Thus, if, in a case involving a transaction between X Co. and Y Co., a court is presented with the argument that D, a director of X Co., is also a major creditor of Y Co. and that that stake in Y Co. gives D a conflicting interest, the court should reply that D's creditor interest in Y Co. does not fit any subcategory of subsection (1)(b) or subsection (3) and therefore the conflict of interest claim must be rejected by force of section 861(1). The result would be otherwise if Y Co.'s debt to D is of such economic significance to D that it would fall under subsection (1)(a) or put him in control of Y Co. and thus come within subdivision (1)(b).

Subdivision (1)(b) has a differentiated threshold keyed to the significance of the transaction. See the Official Comment to subsection (2), below.

It is to be noted that under subsection (1) of Section 860, any interest that the director has that meets the criteria set forth is considered a "conflicting interest." If a director has an interest that meets those criteria, sections 860 through 863 draw no further distinction between a director's interest that clashes with the interests of the corporation and a director's interest that coincides with or is parallel to the interests of the corporation. If the director's "interest" is present, "conflict" is assumed.

2. DIRECTOR'S CONFLICTING INTEREST TRANSACTION. The definition of "director's conflicting interest transaction" in subsection (2) is the key concept of sections 860 through 863, establishing the area that lies within — and without — the scope of the sections' provisions. The definition operates preclusively; it not only designates the area within which the rules of sections 860 through 863 are to be applied but also denies the power of the court to act with respect to conflict of interest claims against directors in circumstances that lie outside the statutory definition of "director's conflicting interest transaction." See section 861(1).

(1) Transaction. To constitute a director's conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity in which the director has a financial interest. As discussed earlier, the safe harbor provisions provided by sections 860 through 863 have no application to circumstances in which there is no "transaction" by the corporation, however apparent the director's conflicting interest. Other strictures of the law

prohibit a director from seizing corporate opportunities for himself and from competing against the corporation of which he is a director; sections 860 through 863 have no application to such situations. Moreover, a director might personally benefit if the corporation takes no action, as where the corporation decides not to make a bid. Sections 860 through 863 have no application to such instances. The limited thrust of sections 860 through 863 is to establish procedures which, if followed, immunize a corporate transaction and the interested director against the common law doctrine of voidability grounded on the director's conflicting interest. See the Introductory Comment for further discussion.

However, a policy decision and a transactional decision can blur and overlap. Assume X Co. operates a steel mini-mill that is running at a loss. A real estate developer offers to buy the land on which the mill is located and the X Co. board, having no other use for the land, accepts the offer. This corporate action can readily be characterized either as a transaction — the sale of the land — or as a business policy decision — to go out of an unprofitable business. If D is a partner of the real estate developer, D has a stake in the sale transaction and subsection (1)(a) and (1)(b) and all of sections 860 through 863 apply. But what if D, having no such interest, is in the local trucking business and a predictable consequence of closing the local mini-mill is that D will benefit from a future increase in demand for hauling services to bring in steel from more distant supply sources. An intent of the words "in or so closely linked to the transaction" in subsections (1)(a) and (1)(b) is to focus sections 860 through 863 on the transaction itself. D's financial stake as a trucker in this situation lies not in the transaction, which is governed by sections 860 through 863, but in the corporate business decision, which is not; accordingly, section 861(1) is inapplicable and imposes no bar to the court's discretion. Board action, though in compliance with section 862, will not, ipso facto, yield safe harbor protection for D or the transaction under section 861(2). The matter will be treated as provided in paragraph 4 of the Introductory Comment.

As another feature of the key term "transaction," the text of subsection (1) emphasizes that the term implies and is limited to action by the corporation itself. The language of sections 860 through 863 has no application one way or the other to economic actions by the director in which the corporation is not a party or in which the corporation takes no action. Thus, a purchase by the director of the corporation's shares on the open market or from a third party is not a "transaction" within the scope of sections 860 through 863 and these sections do not govern an attack made on the propriety of such a share purchase.

If the board of directors of X Co. decides to distribute "poison pill" rights in order to fend off a possible takeover, that occurrence does not constitute a "transaction" as contemplated by sections 860 through 863. See the discussion in division 4 of the Introductory Comment as to the character of a "transaction." If, on the other hand, a board of directors commits the corporation to a "crown jewel" option granted to a third party, there would be a "transaction."

But as noted earlier, for the transaction to be covered by sections 860 through 863, the director (or other person designated by Section 860(1)(b) must have a beneficial interest respecting the transaction. Sections 860 through 863 would obviously govern such a crown jewel contract if a director was himself (or had a defined relationship to) the third party. But the fact that the crown jewel contract was in part motivated by the directors' desire to keep themselves on the board would not, taken alone, constitute a sufficiently direct interest in the transaction to bring it within sections 860 through 863.

(2) Party to the transaction — the corporation. Transaction by what entity? In the usual case, the transaction in question would be by X Co. But assume that X Co. is the controlling corporation of S Co. (i.e., it controls the vote for directors of S Co.). D wishes to sell a building he owns to X Co. and X Co. is willing to buy it. As a business matter, it will often make no difference to X Co. whether it takes the title itself or places it with its subsidiary S Co. or another entity that X Co. controls. The applicability of sections 860 through 863 cannot be allowed to depend upon that formal distinction. These sections therefore include within their operative framework transactions by a subsidiary or controlled entity of X Co. See the Note on Parent Companies and Subsidiaries below.

(3) Party to the transaction — the director. Subsection (1)(a) and subsection (1)(b) differ as to the persons covered and as to the threshold of transactional significance. Subsection (1)(a), addressed to D and related persons of D, includes as directors' conflicting interest transactions all transactions that meet the substantive criteria prescribed. By contrast, subsection (1)(b), addressed to transactions involving other designated persons, excludes from its coverage transactions that are not sufficiently significant to the corporation to warrant decision at the boardroom level.

As a generalization, the linkage between a director and a "related person" is closer than that between the director and those persons and entities specified in subsection (1)(b). Correspondingly, the threshold of conflicting interest under subsection (1)(a) is lower than that set for subsection (1)(b). Thus, all routine transactions of X Co. are excluded from the definition of

director's conflicting interest transaction unless they fall within subsection (1)(a). If Y Co., a computer company of which D is also an outside director, sells office machinery to X Co., the transaction will not normally give rise to a conflicting interest for D from the perspective of either company since the transaction is a routine matter that would not come before either board. If, however, the transaction is of such significance to one of the two companies that it would come before the board of that company, then D has a conflicting interest in the transaction with respect to that company.

Implicit in subsection (1)(b) is a recognition that X Co. and Y Co., particularly if large enterprises, are likely to have routine, perhaps frequent, business dealings with each other as they buy and sell goods and services in the marketplace. The terms of these dealings are dictated by competitive market forces and the transactions are conducted at personnel levels far below the board room. The fact that D has some relationship with Y Co. is not in itself sufficient reason to open these smaller scale impersonal business transactions to challenge if not passed through the board in accordance with section 862 procedures. It would be doubly impractical to do so twice where X Co. and Y Co. have a common director.

Sections 860 through 863 take the practical position. The definition in subsection (1)(b) excludes most such transactions both by its "knowledge" requirement and by its higher threshold of economic significance. In almost all cases, any such transaction, if challenged, would be easily defensible as being "fair." In respect of day-to-day business dealings, the main practical risk of impropriety would be that a director having a conflicting interest might seek to exert inappropriate influence upon the interior operations of the enterprise, might try to use his status as a director to pressure lower level employees to divert their business out of ordinary channels to his advantage. But a director's affirmative misconduct goes well beyond a claim that he has a conflicting interest, and judicial action against such improper behavior remains available. See also the Official Comment to section 862(2) regarding common directors.

The absence of the significance threshold in subsection (1)(a) does not impose an inappropriate burden on directors and related persons. The commonplace and oftentimes recurring transaction will involve purchase of the corporation's product line; it will usually not be difficult for D to show that the transaction was on commercial terms and was fair, or indeed, that he had no knowledge of the transaction. As a result, these transactions do not invite harassing lawsuits against the director. A purchase by D of a product of X Co. at a usual "employee's discount," while technically assailable as a conflicting interest transaction, would customarily be viewed as "fair" to the corporation as a routine incident of the office of director. For other transactions between the corporation and the director or those close to him, D can, and should, have the burden of establishing the fairness of the transaction if it is not passed upon by the arm's length review of qualified directors or the holders of qualified shares. If there are any reasons to believe that the terms of the transaction might be questioned as unfair to X Co., D is well advised to pass the transaction through the safe harbor procedures of sections 860 through 863.

Note on Parent Companies and Subsidiaries

If a subsidiary is wholly owned, there is no outside holder of shares of the subsidiary to be injured with respect to transactions between the two corporations.

Transactions between a parent corporation and a partially-owned subsidiary may raise the possibility of abuse of power by a majority shareholder to the disadvantage of a minority shareholder. Sections 860 through 863 have no relevance as to how a court should deal with that claim.

If there are not at least two outside directors of the subsidiary, the subsidiary and the board of directors must operate on the basis that any transaction between the subsidiary and the parent that reaches the significance threshold in subsection (1)(b) may, as a technical matter, be challengeable by a minority shareholder of the subsidiary on grounds that it is a director's conflicting interest transaction. In that case, the directors of the subsidiary will have to establish the fairness of the transaction to the subsidiary. In practice, however, the case law has dealt with such claims under the rubric of the duties of a majority shareholder and that is, in reality, the better approach. See the Official Comment to section 861(2).

3. RELATED PERSON. Two subcategories of "related person" of the director are set out in subsection (3). These subcategories are specified, exclusive, and preemptive.

The first subcategory is made up of closely related family, or near-family, individuals, trusts, and estates as specified in clause (a). The clause is exclusive insofar as family relationships are concerned. The references to a "spouse" are intended to include a common law spouse or unrelated cohabitant.

The second subcategory is made up of persons specified in clause (b) to whom or which the director is linked in a fiduciary capacity as, for example, in his status as a trustee or administrator. (Note that the definition of "person" in the Model Act includes both individuals and entities. See section 140(17). From the perspective of X Co., D's fiduciary relationships are

always a sensitive concern. A conscientious director may be able to control his own greed arising from a conflicting personal interest. And he may resist the temptation to assist his wife or child. But he can never escape his legal obligation to act in the best interests of another person for whom he is a trustee or other fiduciary.

4. REQUIRED DISCLOSURE. Two separate elements make up the defined term "required disclosure." They are disclosure of the existence of the conflicting interest and then disclosure of the material facts known to D about the subject of the transaction.

Subsection (4) calls for disclosure of all facts known to D about the subject of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment by the person acting for the corporation as to whether to proceed or not to proceed with the transaction. If a director knows that the land the corporation is buying from him is sinking into an abandoned coal mine, he must disclose not only that he is the owner and that he has an interest in the transaction but also that the land is subsiding; as a director of X Co. he may not invoke caveat emptor. But in the same circumstances the director is not under an obligation to reveal the price he paid for the property ten years ago, or that he inherited it, since that information is not material to the corporation's business judgment as to whether or not to proceed with the transaction. Further, while material facts that pertain to the subject of the transaction must be disclosed, a director is not required to reveal personal or subjective information that bears upon his negotiating position (such as, for example, his urgent need for cash, or the lowest price he would be willing to accept). This is true despite the fact that such information would obviously be relevant to the corporation's decision-making in the sense that, if known to the corporation, it could equip the corporation to hold out for terms more favorable to it.

Underlying the definition of the twin components of "required disclosure" is the critically important provision contained in subsection (1) that a basic precondition for the existence of a "conflicting interest" is that the director know of the transaction and also that he know of the existence of his conflicting interest.

5. TIME OF COMMITMENT. The time of the commitment by the corporation (or its subsidiary or other controlled entity) to the transaction is defined in operational terms geared to change of economic position.

Comment on New Sections 860-863 in General.

New Model Act Sections 860-863 represent an entirely new approach to directors' conflicts of interest transactions which goes much further than existing law both in the specificity with which conflicting interest transactions are defined and in the degree of detailed guidance for judicial intervention.

IDAHO REPORTER'S COMMENT

Comment on New Section 860 in Particular.

This definitional section limited to this particular subject matter is a new innovation and seems useful to both practitioners and courts.

30-1-861. Judicial action. — (1) A transaction effected or proposed to be effected by a corporation or by a subsidiary of the corporation, or any other entity in which the corporation has a controlling interest, that is not a director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because a director of the corporation, or any person with whom or which he has a personal, economic, or other association, has an interest in the transaction.

(2) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which he has a personal, economic, or other association, has an interest in the transaction, if:

(a) Directors' action respecting the transaction was at any time taken in compliance with section 30-1-862, Idaho Code;

(b) Shareholders' action respecting the transaction was at any time taken in compliance with section 30-1-863, Idaho Code; or

(c) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

History.

I.C., § 30-1-861, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 861 is the operational section of sections 860 through 863 as it prescribes the judicial consequences of the other sections.

Speaking generally:

(i) If the procedure set forth in section 862 or in section 863 is complied with, or if the transaction is fair to the corporation, then a director's conflicting interest transaction is immune from attack on any ground of a personal interest or conflict of interest of the director. However, the narrow scope of sections 860 through 863 must again be strongly emphasized; if the transaction is vulnerable to attack on some other ground, these sections do not make it less so for having been passed through the sections' procedures. See, however, paragraph 4 of the Introductory Comment.

(ii) If a transaction is not a director's conflicting interest transaction as defined in section 860, then the transaction may not be enjoined, rescinded, or made the basis of other sanction on the ground of a conflict of interest of a director, whether or not it went through the procedures of sections 860 through 863. In that sense, these sections are specifically intended to be both comprehensive and exclusive.

(iii) If a transaction that is a director's conflicting interest transaction was not at any time the subject of action taken in compliance with section 862 or section 863, and it is attacked on grounds of a director' s conflicting interest and is not shown to be fair to the corporation, then the court may grant such remedial action as it considers appropriate under the applicable law of the jurisdiction. If the attack is on other grounds, sections 860 through 863 have no relevance to the issue(s) before the court.

1. SECTION 861(1). Section 861(1) is a key component in the design of sections 860 through 863. It draws a bright-line circle, declaring that the definitions of section 860 wholly occupy and preempt the field of directors' conflicting interest transactions. Of course, outside this circle there is a penumbra of director interests, desires, goals, loyalties, and prejudices that may, in a particular context, run at odds with the best interests of the corporation, but section 861(1) forbids a court to ground remedial action on any of them. If a plaintiff charges that a director had a conflict of interest with respect to a transaction of the corporation because the other party was his cousin, the answer of the court should be: "No. A cousin, as such and without more, is not included in section 860(c) as a related person — and under section 861(1), I have no authority to reach out farther." If a plaintiff contends that the director had a conflict of interest in a corporate transaction because the other party is president of the golf club the director wants desperately to join, the court should respond: "No. The only director's conflicting interest on the basis of which I can set aside a corporate transaction or impose other sanctions is a financial interest as defined in section 860." The reason why sections 860 through 863 adopt this bright-line approach is reviewed in the Introductory Comment.

In the real world, however, matters are often not clear, and one cannot always predict with comfort a future judicial response. It must be expected that quite often a director (and his legal/business advisors) may be in doubt as to whether a particular person would or would not be held to fall within a subcategory in section 860(c), or whether the economic impact on the director will be considered "in or closely linked" to the transaction, or whether the director is an "agent" or "employee," or whether the scale of the director's interest is large enough to be likely to sway him if brought to a vote. Some directors will wish, too, to make it clear that they are leaning over backwards. In such circumstances, the obvious avenue to follow is to clear the matter with qualified directors under section 862 or with the holders of qualified shares under section 863. If it is later judicially determined that a conflicting interest of the director did exist, the director will be grateful for the safe harbor protection. If it should be ultimately held that there was no conflicting interest in the transaction as defined by sections 860 through 863, no harm (other than nuisance) has been done by passing the transaction through the procedures of section 862 or section 863. It may be expected, therefore, that the procedures of section 862

(and, to a lesser extent, section 863) will be used with regard to many transactions that lie outside the sharp definitions of section 860 — a result that is healthy and constructive.

Once again, it is important to stress that sections 860 through 863 deal only with "transactions." If a non-transactional corporate decision is challenged on the ground that D has a conflicting personal stake in it, subsection 861(1) is irrelevant. For a discussion of corporate action that may be considered either a business decision or a transaction, see the Official Comment to section 860(1)(b) and paragraph 4 of the Introductory Comment.

2. SECTION 861(2). Section 861(2) is the heart of sections 860 through 863 — the fundamental section that provides for the safe harbor.

Clause (a) of subsection (2) provides that if a director has a conflicting interest respecting a transaction, neither the transaction nor the director is legally vulnerable if the procedures of section 862 have been properly followed. Subsection (2)(a) is, however, subject to a critically important predicate condition.

The condition — an obvious one — is that the board's action must comply with the care, best interests and good faith criteria prescribed in section 830(1) for all directors' actions. If the directors who voted for the conflicting interest transaction were qualified directors under sections 860 through 863, but approved the transaction merely as an accommodation to the director with the conflicting interest, going through the motions of board action without complying with the requirements of section 830(1), the action of the board would not be given effect for purposes of section 861(2)(a).

Board action on a director's conflicting interest transaction provides a context in which the function of the "best interests of the corporation" language in section 830(1) is brought into clear focus. Consider, for example, a situation in which it is established that the board of a manufacturing corporation approved a cash loan to a director where the duration, security and interest terms of the loan were at prevailing commercial rates, but (i) the loan was not made in the course of the corporation's ordinary business and (ii) the loan required a commitment of limited working capital that would otherwise have been used in furtherance of the corporation's business activities. Such a loan transaction would not be afforded safe-harbor protection by section 862(2)(a) since the board did not comply with the requirement in section 830(1) that the board's action be, in its reasonable judgment, in the best interests of the corporation — that is, that the action will, as the board judges the circumstances at hand, yield favorable results (or reduce detrimental results) as judged from the perspective of furthering the corporation's business activities.

If a determination is made that the terms of a director's conflicting interest transaction, judged according to the circumstances at the time of commitment, were manifestly unfavorable to the corporation, that determination would be relevant to an allegation that the directors' action was not taken in good faith and therefore did not comply with section 830(1).

The Model Act does not undertake to prescribe litigation procedures. If board action under section 862(2)(a) is interposed as a bar to a challenge to a director's conflicting interest transaction and the complainant wishes to put in issue an alleged non-compliance with section 830(1) by the board, he would do so by proceeding under the same local pleading, presumption and burden of proof rules that would govern any other attack on an action of a board of directors.

Clause (b) of subsection (2) regarding shareholders' approval of the transaction is the matching piece to clause (a) regarding directors' approval.

Clause (c) of subsection (2) provides that a director's conflicting interest transaction will be secure against judicial intervention if the interested director (or the corporation, if it chooses) shows that although neither directors' nor shareholders' action was taken complying with sections 862 or 863, the transaction was fair to the corporation. The term "fair" accords with traditional language in the cases. But it must be understood that, as used in the context of those cases and of sections 860 through 863, the term has a special, flexible meaning and a wide embrace.

Note on Fair Transactions

(1) Terms of the Transaction. If the issue in a transaction is the "fairness" of a price, "fair" is not to be taken to imply that there is a single "fair" price, all others being "unfair." It has long been settled that a "fair" price is any price in that broad range which an unrelated party might have been willing to pay or willing to accept, as the case may be, for the property, following a normal arm's-length business negotiation, in the light of the knowledge that would have been reasonably acquired in the course of such negotiations, any result within that range being "fair." The same statement applies not only to price but to any other key term of the deal.

Although the "fair" criterion applied by the court is a range rather than a point, the width of that range is only a segment of the full spectrum of the directors' discretion associated with the exercise of business judgment under section 830(1). That is to say, the scope of decisional

discretion that a court would have allowed to the directors if they had acted and had complied with section 830(1) is wider than the range of "fairness" contemplated for judicial determination where section 861(2)(c) is the governing provision.

(2) Benefit to the Corporation. In considering the "fairness" of the transaction, the court will in addition be required to consider not only the market fairness of the terms of the deal, but also, as the board would have been required to do, whether the transaction was one that was reasonably likely to yield favorable results (or reduce detrimental results) from the perspective of furthering the corporation's business activities. Thus, if a manufacturing company that is short of working capital allocates some of its scarce funds to purchase a sailing yacht owned by one of its directors, it will not be easy to persuade the court that the transaction is "fair" in the sense that it was reasonably made to further the business interests of the corporation; the fact that the price paid for the yacht was stipulated to be a "fair" market price will not be enough alone to uphold the transaction. See also the discussion above regarding section 830(1).

(3) Process of Decision. In some circumstances, the behavior of the director having the conflicting interest can itself affect the finding and content of "fairness." The most obvious illustration of unfair dealing arises out of the director's failure to disclose fully his interest or hidden defects known to him regarding the transaction. Another illustration could be the exertion of improper pressure by the director upon the other directors. When the facts of such unfair dealing become known, the court should offer the corporation its option as to whether to rescind the transaction on grounds of "unfairness" even if it appears that the terms were "fair" by market standards and the corporation profited from it. If the corporation decides not to rescind the transaction because of business advantages accruing to the corporation from it, the court may still find in the director's misconduct a basis for judicially imposed sanction against the director personally. Thus, the course of dealing — or process — is a key component to a "fairness" determination under subsection (2)(c).

Note on Directors' Compensation

Directors' fees and similar forms of compensation, expense reimbursement practices, directors' and officer's liability insurance and routine incidents of office (such as a privilege to buy the corporation's products at a discount) in the normal course of business are typically set by the board and are specially authorized (though not regulated) by sections 811 and 857 of the Model Act. These practices obviously involve a conflicting interest on the part of most if not all of the directors and are capable of being abused, although, in the usual case, they fall within normative patterns and fairness can be readily established. While, as a matter of practical necessity, these practices are universally accepted in principle by the law, board action on directors' compensation and benefits would be subject to judicial sanction if not in the circumstances fair to the corporation or favorably acted upon by shareholders pursuant to section 863. Sustainable action by the board in this regard must, of course, meet the general criteria for board action prescribed in Section 830(1); see the Official Comment to section 861(2).

Note on Directors' Personal Liability

At common law, articulation of the legal principles applicable to directors' conflicts of interest typically declare the transaction to be void or (sometimes) voidable. These formulations say little about the liabilities, if any, of the parties to the transaction. It is clear, however, that in some special circumstances a court would hold that the interested director must disgorge the profits he made from the transaction or must respond in damages for injury suffered by the corporation as a result of the transaction. Such sanctions could arise in contexts where the court leaves the transaction itself in place as well as in situations where the court rescinds the transaction. Sections 860 through 863 leave these matters of sanction entirely to the judgment of the court.

In some situations, a transaction will contain an element of conflicting interest on the part of the director but in reality the director himself is a surrogate in the board room and not the real beneficiary of the transaction. Thus, where P Co. is a majority or controlling shareholder in X Co., and some or all of the directors of X Co. are the employees or agents of P Co., there is always a risk that, in a transaction between P Co. and X Co., P Co. may take advantage of its position to press its agents and employees who are on the X Co. board to approve a transaction that is disadvantageous to X Co. but advantageous to P Co. Under sections 860 through 863, if X Co. has directors who are not affiliated with P Co., action pursuant to section 862 is possible. But many less-than-wholly-owned subsidiaries have no unaffiliated directors to pass on a transaction between X Co. and its controlling shareholder P Co. In such a circumstance, the minority shareholders of X Co. are entitled to fair treatment; if they are not treated fairly, the responsibility should, in most cases, be laid at the door of P Co. and not be placed upon P Co.'s agents or employees on the X Co. board.

As a matter of case law, the courts have arrived at that result by treating such cases under the rubric of the duty of fair dealing on the part of the controlling shareholder vis-á- vis the minority shareholders. In so doing, the courts have deliberately skipped over any analytically available alternative approach predicated on a theory of conflicting interest of the X Co. director who is an employee or agent of the controlling shareholder. All rights of minority shareholders against a controlling shareholder are preserved unaffected by sections 860 through 863. All directors of X Co., regardless of their other affiliations, have duties to perform for the benefit of all X Co. shareholders, not just some of them. D is not relieved of those obligations merely because he happens to be an employee of the majority shareholder. At the same time, in these circumstances D often has little real discretion in voting to approve the transaction and the beneficiary of the transaction is not D but P Co., his employer.

In a transaction between P Co. and X Co., if the transaction is important to X Co., if D is an agent or employee of P Co., if the transaction is not protected by the procedures of section 862 or section 863, and if the transaction is not shown to be fair to X Co., then a court may well set aside the transaction or take other remedial action with regard to P Co., but it would not usually be equitable in such cases to hold D personally liable.

Parallels to this commonplace parent-subsidiary example can also arise under sections 860 through 863 out of almost any circumstance that meets the criteria of section 860(1)(b). It is evident that a common director of X Co. and of Y Co. has a degree of conflicting interest in a transaction between the two corporations; but (assuming no valid safe harbor action under sections 860 through 863) the sanction that would be appropriate would in most circumstances be addressed to the transaction itself and to one or both of the companies involved, rather than to D personally. See the Official Comment to section 860(2) and section 862(4).

IDAHO REPORTER'S COMMENT

New Model Act § 861 continues prior I.C. §30-1-41's elimination of the old common law principle of automatic voidability of conflict of interest transactions. New subsection (2)(c) drops the prior provision that even a fair transaction is void or voidable unless the director's interest is disclosed.

30-1-862. Directors' action. — (1) Directors' action respecting a transaction is effective for purposes of section 30-1-861(2)(a), Idaho Code, if the transaction received the affirmative vote of a majority, but no fewer than two (2), of those qualified directors on the board of directors or on a duly empowered committee of the board who voted on the transaction after either required disclosure to them, to the extent the information was not known by them, or compliance with subsection (2) of this section; provided that action by a committee is so effective only if:

(a) All its members are qualified directors; and

(b) Its members are either all the qualified directors on the board or are appointed by the affirmative vote of a majority of the qualified directors on the board.

(2) If a director has a conflicting interest respecting a transaction, but neither he nor a related person of the director specified in section 30-1-860(3)(a), Idaho Code, is a party to the transaction, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director may not make the disclosure described in section 30-1-860(4)(b), Idaho Code, then disclosure is sufficient for purposes of subsection (1) of this section if the director:

(a) Discloses to the directors voting on the transaction the existence and nature of his conflicting interest and informs them of the character and limitations imposed by that duty before their vote on the transaction, and

(b) Plays no part, directly or indirectly, in their deliberations or vote.

(3) A majority, but no fewer than two (2), of all the qualified directors on the board of directors, or on the committee, constitutes a quorum for purposes of action that complies with this section. Directors' action that otherwise complies with this section is not affected by the presence or vote of a director who is not a qualified director.

(4) For purposes of this section, "qualified director" means, with respect to a director's conflicting interest transaction, any director who does not have either:

(a) A conflicting interest respecting the transaction; or

(b) A familial, financial, professional or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction.

History.
I.C., § 30-1-862, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 862 provides the procedure for action of the board of directors under sections 860 through 863. In the normal course, this section, taken together with section 861(2), will be the key provision for dealing with directors' conflicting interest transactions.

All discussion of section 862 must be conducted in light of the overarching provisions of section 830(1) prescribing the criteria for decisions by directors. Board action that does not comply with the requirements of section 830(1) will not, of course, be given effect under section 862. See the Official Comment to section 861(2).

1. SECTION 862(1). A transaction in which a director has a conflicting interest is approved under section 862 if and only if it is approved by qualified directors, as defined in subsection 862(4). Action by the board of directors as a whole is effective if approved by the affirmative vote of a majority (but not less than two) of the qualified directors on the board. Action may also be taken by a duly authorized committee of the board but, to be effective, all members of the committee must be qualified directors and the committee must either contain all of the qualified directors on the board or must have been appointed by the affirmative vote of a majority of the qualified directors on the board. The effect of the limitation on committee action is to make it impossible to hand-pick as committee members a favorably inclined minority from among the qualified directors.

Except to the limited extent provided in subsection (2), approval by the board or committee must be preceded by required disclosure.

Action complying with subsection 862(1) may be taken by the board of directors at any time, before or after the transaction, and may deal with a single transaction or a specified category of similar transactions.

2. SECTION 862(2). Subsection (2) is a new provision designed to deal, in a practical way, with situations in which a director who has a conflicting interest is not able to comply fully with the disclosure requirement of subsection (1) because of an extrinsic duty of confidentiality. The director may, for example, be prohibited from making full disclosure because of restrictions of law that happen to apply to the transaction (e.g., grand jury seal or national security statute) or professional canon (e.g. lawyers' or doctors' client privilege). The most frequent use of subsection (2), however, will undoubtedly be in connection with common directors who find themselves in a position of dual fiduciary obligations that clash. If D is also a director of Y Co., D may have acquired privileged confidential information from one or both sources relevant to a transaction between X Co. and Y Co. that he cannot reveal to one without violating his fiduciary duty to the other. In such circumstances, subsection (2) makes it possible for such a matter to be brought to the board for consideration under subsection (1) and thus enable X Co. to secure the protection afforded by sections 860 through 863 for the transaction despite the fact that D cannot make the full disclosure usually required.

To comply with subsection (2), D must disclose that he has a conflicting interest, inform the directors who vote on the transaction of the nature of his duty of confidentiality (e.g., inform

them that it arises out of an attorney-client privilege or his duty as a director of Y Co. that prevents him from making the disclosure called for by clause (b) of section 860(4)), and then play no personal part in the board's deliberations. The point of subsection (2) is simply to make clear that the provisions of sections 860 through 863 may be employed with regard to a transaction in circumstances where an interested director cannot, because of enforced fiduciary silence, make disclosure of the facts known to him. Of course, if D invokes subsection (2) and then remains silent before leaving the boardroom, the remaining directors may decline to act on the transaction if troubled by a concern that D knows (or may know) something they do not. On the other hand, if D is subject to an extrinsic duty of confidentiality but has no knowledge of facts that should be disclosed, he would normally so state and disregard subsection (2), and (having disclosed the existence and nature of his conflicting interest) thereby comply with section 860(4).

A director could, of course, encounter the same problem of mandated silence with regard to any matter that comes before the board; that is, the problem of forced silence is not linked at all to the problems of transactions involving a conflicting interest of a director. It could easily happen that at the same board meeting of X Co. at which D, the interested director, invokes section 862(2) and excuses himself, another director who has absolutely no financial interest in the transaction might conclude that under local law he is bound to silence (because of attorney-client privilege, for example) and would under general principles of sound director conduct withdraw from participation in the board's deliberations and action.

While sections 860 through 863 explicitly contemplate the application of subsection (2) to the frequently recurrent problem of common directors and officers, it should not otherwise be read as attempting to define the scope or mandate the consequences of various silence-privileges; that is a topic for local law.

Subsection (2) is not available to D if the transaction is directly between the corporation and D or his related person — if, that is, the director or a related person is a party to the transaction. If D or a related person is a party to the transaction, D's only options are required disclosure on an unqualified basis, abandonment of the transaction, or acceptance of the risk of establishing fairness in a court proceeding if the transaction is challenged.

Whenever D proceeds as provided in subsection 862(2), the board should recognize that he may well have information that in usual circumstances he would be required to reveal to the board — information that may well indicate that the transaction is a favorable or unfavorable one for X Co.

3. SECTION 862(3). Subsection (3) contains technical provisions dealing with quorum and superfluous votes by interested directors.

4. SECTION 862(4). Obviously, a director's conflicting interest transaction and D cannot be provided safe harbor protection by fellow directors who themselves have conflicting interests; only "qualified directors" can provide such safe harbor protection pursuant to subsection (1). "Qualified director" is defined in subsection (4). The definition is broad. It excludes not only any director who has a conflicting interest respecting the matter, but also — going significantly beyond the persons specified in the subcategories of section 860(1)(b) for purposes of the "conflicting interest" definition — any director whose familial or financial relationship with D or whose employment or professional relationship with D would be likely to influence the director's vote on the transaction.

The determination of whether there is a financial, employment or professional relationship should be based on the practicalities of the situation rather than formalistic circumstances. For example, a director employed by a corporation controlled by D should be regarded as having an employment relationship with D.

IDAHO REPORTER'S COMMENT

The detail for "safe harbor" approval of conflict of interest transactions under this new Model Act § 862 goes far beyond that in prior I.C. § 30-1-41.

30-1-863. Shareholders' action. — (1) Shareholders' action respecting a transaction is effective for purposes of section 30-1-861(2)(b), Idaho Code, if a majority of the votes entitled to be cast by the holders of all qualified shares were cast in favor of the transaction after:

(a) Notice to shareholders describing the director's conflicting interest transaction;

(b) Provision of the information referred to in subsection (4) of this section; and

(c) Required disclosure to the shareholders who voted on the transaction, to the extent the information was not known by them.

(2) For purposes of this section, "qualified shares" means any shares entitled to vote with respect to the director's conflicting interest transaction except shares that, to the knowledge, before the vote, of the secretary, or other officer or agent of the corporation authorized to tabulate votes, are beneficially owned, or the voting of which is controlled, by a director who has a conflicting interest respecting the transaction or by a related person of the director, or both.

(3) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of action that complies with this section. Subject to the provisions of subsections (4) and (5) of this section, shareholders' action that otherwise complies with this section is not affected by the presence of holders, or the voting, of shares that are not qualified shares.

(4) For purposes of compliance with subsection (1) of this section, a director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary, or other officer or agent of the corporation authorized to tabulate votes, of the number, and the identity of persons holding or controlling the vote, of all shares that the director knows are beneficially owned, or the voting of which is controlled, by the director or by a related person of the director, or both.

(5) If a shareholders' vote does not comply with subsection (1) of this section solely because of a failure of a director to comply with subsection (4) of this section, and if the director establishes that his failure did not determine and was not intended by him to influence the outcome of the vote, the court may, with or without further proceedings respecting section 30-1-861(2)(c), Idaho Code, take such action respecting the transaction and the director, and give such effect, if any, to the shareholders' vote, as it considers appropriate in the circumstances.

History.

I.C., § 30-1-863, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 863 provides the machinery for shareholders safe harbor of a director's conflicting interest transaction, as section 862 provides the machinery for safe harbor by action of directors.

1. SECTION 863(1). Subsection (1) specifies the procedure required to establish effective safe harbor protection of a director's conflicting interest transaction through vote of shareholders. In advance of the vote, three steps must be taken. Shareholders must be given notice describing the transaction. D must provide the information called for in subsection (4), discussed below. And required disclosure must be made, as defined in section 860(4). If, then, a majority of all qualified shares that are entitled to vote on the matter vote favorably, the safe harbor provision of section 861(2)(b) becomes effective.

Action that complies with subsection 863(1) may be taken at any time, before or after the transaction. Note that section 863 does not contain a provision comparable to section 862(2). Thus, the safe harbor protection of sections 860 through 863 cannot be made available through shareholder action under section 863 in a case where D remains silent because of an extrinsic

duty of confidentiality. This is advertent. While it is believed that the section 862(2) procedure is workable in the collegial setting of the board room, one must have reservations whether the same is true vis-á-vis the shareholder body, especially in larger corporations where there is heavy reliance upon the proxy mechanics. In most situations no opportunity exists for shareholders to quiz D about his duty and to discuss the implications of acting without the benefit of D's knowledge concerning the transaction. In a case involving a closely-held corporation where section 863 procedures are followed, but with D acting as provided in section 862(2), a court could, of course, attach significance to a favorable shareholder vote in evaluating the fairness of the transaction to the corporation. See the discussion in paragraph 4 of the Introductory Comment.

2. SECTION 863(2). Under subsection (1), only "qualified shares" may be counted in the vote for purposes of safe harbor action pursuant to section 861(2)(b). Subsection (2) defines "qualified shares" to exclude all shares that, prior to the vote, the secretary or other tabulator of the votes *knows* to be owned or controlled by the director who has the conflicting interest or any related person of that director. It should be stressed that this definition is dependent upon the tabulator's actual knowledge. If the tabulator does not know that certain shares are owned by the director who has the conflicting interest, he cannot be expected to exclude those shares from the vote count. But see the Official Comment to subsection (5).

The category of persons whose shares are excluded from the vote count under subsection (2) is not the same as the category of persons specified in section 860(1)(b) for purposes of defining D's "conflicting interest" and — *importantly* — is not the same as the category of persons excluded for purposes of the definition of non-qualified directors under section 862(4). The distinctions among these three categories are deliberate and carefully drawn.

The definition of "qualified shares" excludes shares owned by D or a related person as defined in section 860(3). If D is an employee or director of Y Co., Y Co. is *not* prevented by that fact from exercising its usual voting rights as to any shares it may hold in X Co. D's linkage to a related person is close. But the net of section 860(1)(b) specifying other persons and entities for purposes of the "conflicting interest" definition is cast so wide that D will never be able to know whether, nor have a reason to try to monitor whether, some person within those subcategories holds X Co. shares. Typically, moreover, D will have no control over those persons and how they vote their X Co. shares. There is, in reality, no reason to strip those persons of their voting rights as shareholders, for in the usual commercial situation they will vote in accordance with their own interests, which may well not coincide with the personal interest of D.

To illustrate the operation of subsection (2), consider a case in which D is also a director of Y Co., and to his knowledge: thirty percent of Y Co.'s stock is owned by X Co.; D, his wife, a trust of which D is the trustee, and a corporation he controls, together own ten percent of X Co. 's stock but not stock of Y Co.; and X Co. and Y Co. wish to enter into a transaction that is of major significance to both.

From the perspective of X Co., D has a conflicting interest since he is a director of Y Co. If X Co. submits the transaction to a vote of its shareholders under section 863, the shares held by D, his wife, the trust of which he is the trustee, and the corporation he controls are not qualified shares and may not be counted in the vote.

From the perspective of Y Co., D has a conflicting interest since he is a director of X Co. If Y Co. submits the transaction to a vote of its shareholders under section 863, the thirty percent of Y Co. shares held by X Co. *are* qualified shares and may be counted for purposes of section 863. The same would be equally true if X Co. were the majority shareholder of Y Co., but as emphasized elsewhere, the vote under section 863 has no effect whatever of exonerating or protecting X Co. if X Co. fails to meet any legal obligation that, as the majority shareholder of Y Co., it may owe to the minority shareholders of Y Co.

3. SECTION 863(3). Subsection (3) contains administratively useful quorum provisions and provides that superfluous voting of shares that were not qualified to vote does not vitiate the effectiveness of the vote. But see subsection (5).

The fact that certain shares are not qualified and are not countable for purposes of subsection (1) says nothing as to whether they are properly countable for other purposes such as, for example, a statutory requirement that a certain fraction of the total vote or a special majority vote be obtained.

4. SECTION 863(4). In most circumstances, the secretary of X Co. will have no way to know whether certain of X Co. 's outstanding shares should be excluded from the teller's count because of the identity of the owners or of those persons who control the voting of the shares. Subsection (1) together with subsection (4) therefore impose on a director who has a conflicting interest respecting the transaction, as a prerequisite to safe harbor protection by shareholder vote, the obligation to inform the secretary, or other officer or agent authorized to tabulate votes, of the number and holders of shares known by him to be owned by him or by a related person of his. Thus, a director who has a conflicting interest respecting the transaction, because

he stands to make a commission from it, is obligated to report shares owned or the vote of which is controlled by him and by all related persons of his; a director who has a conflicting interest respecting the transaction because his brother stands to make a commission from it has the same reporting obligation. The tabulator may also, of course, have other independent knowledge of shares that are owned or controlled by a related person of the director. If the tabulator of votes knows that particular shares should be excluded but fails to exclude them from the count and their inclusion in the vote does not affect is outcome, subsection (3) governs and the shareholders' vote stands. If the improper inclusion determines the outcome, the shareholders' vote fails to comply with subsection (1). If the tabulator *does not know* that certain shares are owned or controlled by the director who has the conflicting interest or a related person of his, the shares are "qualified" pursuant to the definition in subsection (2), and the vote cannot be attacked on that ground for failure to comply with subsection (1); but see subsection (5).

5. SECTION 863(5). If D did not provide the information required under subsection (4), on the face of it shareholders' action is not in compliance with subsection (1) and D has no safe harbor under subsection (1). In the absence of such safe harbor D can be put to the challenge of establishing the fairness of the transaction under section 861(2)(c).

That result is the proper one where D's failure to inform was determinative of the vote or, worse, was part of a deliberate effort on D's part to influence the outcome of the vote. But if D's omission was essentially an act of negligence, if the number of unreported shares was not determinative of the outcome of the vote, and if the omission was not motivated by D's effort to influence the integrity of the voting process, the court should be free to fashion an appropriate response to the situation in the light of all the considerations at the time of trial. The court should not be automatically forced by the mechanics of sections 860 through 863 to a lengthy and retrospective trial on "fairness." Subsection (5) grants the court that discretion in those circumstances and permits it to accord such effect, if any, to the shareholders' vote, or grant such relief respecting the transaction or D, as the court may find appropriate.

Despite the presumption of regularity customarily accorded the secretary's record, a plaintiff may go behind the secretary's record for purpose of subsection (5).

IDAHO REPORTER'S COMMENT

Again, here in new Model Act § 863 we see impressively detailed specification as to shareholder-approved safe harbor protection of conflict of interest transactions.

Part 9. Domestication

30-1-901. Excluded transactions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. See § 30-18-101 et seq.

30-1-902. Required approvals. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-902, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. See § 30-18-101 et seq.

30-1-903 — 30-1-919. [Reserved.]

30-1-920. Domestication. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-1-920, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. See § 30-18-101 et seq.

30-1-921. [Reserved.]

30-1-922. Articles of domestication. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-1-922, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. See § 30-18-101 et seq.

30-1-923. [Reserved.]

30-1-924. Effect of domestication. [Repealed]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-1-924, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. See § 30-18-101 et seq.

30-1-925 — 30-1-956. [Reserved.]

Part 10. Amendment of Articles of Incorporation and Bylaws

30-1-1001. Authority to amend articles of incorporation. — (1) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation as of the effective date of the amendment or to delete a provision that is not required to be contained in the articles of incorporation.

(2) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend, entitlement, or purpose or duration of the corporation.

History.
I.C., § 30-1-1001, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 30, p. 907.

ABA OFFICIAL COMMENT

Section 1001(1) authorizes a corporation to amend its articles of incorporation by adding a new provision to its articles of incorporation, modifying an existing provision, or deleting a provision in its entirety. The sole test for the validity of an amendment is whether the provision

could lawfully have been included in (or in the case of a deletion, omitted from) the articles of incorporation as of the effective date of the amendment.

The power of amendment must be exercised pursuant to the procedures set forth in part 10. Section 1003 requires most amendments to be approved by a majority of the votes cast on the proposed amendment at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast is present. This requirement is supplemented by section 1004, which governs voting by voting groups on amendments that directly affect a single class or series of shares, and by section 727, which governs amendments that change the voting requirements for future amendments.

Section 1001(2) restates the policy embodied in earlier versions of the Act and in all modern state corporation statutes, that a shareholder "does not have a vested property right" in any provision of the articles of incorporation. Under section 102, corporations and their shareholders are also subject to amendments of the governing statute.

Section 1001 should be construed liberally to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 1001(2) rejects decisions by a few courts that have applied a vested right or property right doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation.

Under general corporation law and under the Act, a provision in the articles of incorporation is subject to amendment under section 1001 even though the provision is described, referred to, or stated in a share certificate, information statement, or other document issued by the corporation that reflects provisions of the articles of incorporation. The only exception to this unlimited power of amendment is section 627, which provides that without the consent of the holder, amendments cannot impose share transfer restrictions on previously issued shares.

However, section 1001 does not concern obligations of a corporation to its shareholders based upon contracts independent of the articles of incorporation. An amendment permitted by this section may constitute a breach of such a contract or of a contract between the shareholders themselves. A shareholder with contractual rights (or who otherwise is concerned about possible onerous amendments) may obtain complete protection against these amendments by establishing procedures in the articles of incorporation or bylaws that limit the power of amendment without the shareholder's consent. In appropriate cases, a shareholder may be able to enjoin an amendment that constitutes a breach of a contract.

Minority shareholders are protected from the power of the majority to impose onerous or objectionable amendments in several ways. First, such shareholders may have the right to vote on amendments by separate voting groups (section 1004). Second, a decision by a majority shareholder or a control group to exercise the powers granted by this section in a way that may breach a duty to minority or noncontrolling interests may be reviewable by a court under its inherent equity power to review transactions for good faith and fair dealing to the minority shareholders. *McNulty v. W. & J. Sloane*, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945); *Kamena v. Janssen Dairy Corp.*, 133 N.J. Eq. 214, 31 A.2d 200, 202 (Ch. 1943), aff'd, 134 N.J. Eq. 359, 35 A.2d 894 (1944) (where the court stated that it "is more a question of fair dealing between the strong. and the weak than it is a question of percentages or proportions of the votes favoring the plan"). See also *Teschner v. Chicago Title & Trust Co.*, 59 Ill. 2d 452, 322 N.E.2d 54, 57 (1974), where the court, in upholding a transaction that had a reasonable business purpose, relied partially on the fact that there was "no claim of fraud or deceptive conduct ... [or] that the exchange offer was unfair or that the price later offered for the shares was inadequate."

Because of the broad power of amendment contained in this section, it is unnecessary to make any reference to, or reserve, an express power to amend in the articles of incorporation.

IDAHO REPORTER'S COMMENT

The most obvious difference between § 1001 and pre-1997 I.C. § 30-1-58 is the elimination of the list of specific powers of amendment. The idea behind the list in the prior statute was to foreclose any argument that an amendment violates "vested rights" of shareholders. Even though the old vested rights doctrine has been consistently rejected by the vast majority of courts since the 1930s, most modern corporation statutes had continued to list specific powers of amendment. The Model Act eliminates the list as unnecessary but preserves its objective in subsection 1001(2). Stylistic changes were also made throughout § 1001 in 1997 and in subsection (1) in 2004.

30-1-1002. Amendment before issuance of shares. — If a corporation has not yet issued shares, its board of directors, or its incorporators if

it has no board of directors, may adopt one (1) or more amendments to the corporation's articles of incorporation.

History.
I.C., § 30-1-1005, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 34, p. 907.

STATUTORY NOTES

Compiler's Notes.
This section was formerly compiled as § 30-1-1005.

Former § 30-1-1002 was amended and redesignated as § 30-1-1005.

ABA OFFICIAL COMMENT

Section 1002 provides that, before any shares are issued, amendments may be made by the persons empowered to complete the organization of the corporation. Under section 204 the organizers may be either the incorporators or the initial directors named in the articles of incorporation.

IDAHO REPORTER'S COMMENT

Section 1002 seems substantially equivalent to pre-1997 I.C. § 30-1-59(a), second sentence. The new provision is arguably more flexible than the old in dropping the words "resolution" and "all."

In 2004 this provision was renumbered (from section 1005) and slight stylistic changes were made. Old section 1002 (amendment by board of directors) became section 1005.

30-1-1003. Amendment by board of directors and shareholders. — If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted in the following manner:

(1) The proposed amendment must be adopted by the board of directors.

(2) Except as provided in sections 30-1-1005, 30-1-1007 and 30-1-1008, Idaho Code, after adopting the proposed amendment: the board of directors must submit the amendment to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

(3) The board of directors may condition its submission of the amendment to the shareholders on any basis.

(4) If the amendment is required to be approved by the shareholders, and the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the amendment and must contain or be accompanied by a copy of the amendment.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (3) of this section, requires a greater vote or a greater number of shares to be present, approval of the amendment requires the

approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the amendment exists, and, if any class or series of shares is entitled to vote as a separate group on the amendment, except as provided in section 30-1-1004(3), Idaho Code, the approval of each such separate voting group at a meeting at which a quorum of the voting group consisting of at least a majority of the votes entitled to be cast on the amendment by that voting group exists.

History.
I.C., § 30-1-1003, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 32, p. 907.

ABA OFFICIAL COMMENT

1. IN GENERAL. Under section 1003, if a corporation has issued shares, a proposed amendment to the articles of incorporation must be adopted by the board. Thereafter, the board must submit the amendment to the shareholders for their approval, except as provided in sections 1005, 1007, and 1008.

2. SUBMISSION TO THE SHAREHOLDERS. Section 1003 requires the board of directors, after having adopted an amendment, to submit the amendment to the shareholders for approval except as otherwise provided by sections 1005, 1007, and 1008. When submitting the amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation. For example, the board of directors may make such a determination where there is not a sufficient number of directors free of a conflicting interest to approve the amendment or because the board of directors is evenly divided as to the merits of an amendment but is able to agree that shareholders should be permitted to consider the amendment. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances, and communicate the basis for the determination, when submitting the amendment to the shareholders. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, shareholders should not be asked to act on an amendment in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the amendment and the interests of shareholders.

Section 1003(3) permits the board of directors to condition its submission of an amendment on any basis. Among the conditions that a board might impose are that the amendment will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders, or (ii) if shareholders holding more than a specified fraction of outstanding shares assert appraisal rights. The board of directors is not limited to conditions of these types.

3. QUORUM AND VOTING. Section 1003(5) provides that approval of an amendment requires approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the amendment exists, including, if any class or series of shares is entitled to vote as a separate group on the amendment, the approval of each such separate group, at a meeting at which a similar quorum of the voting group exists. If a quorum exists, then under sections 725 and 726 the amendment will be approved if more votes are cast in favor of the amendment than against it by the voting group or separate voting groups entitled to vote on the plan. This represents a change from the Act's previous voting rule for amendments, which required approval by a majority of votes cast, with no minimum quorum, for some amendments, and approval by a majority of the votes entitled to be cast by a voting group, for others.

If an amendment would affect the voting requirements on future amendments, it must also be approved by the vote required by section 727.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997 the most significant differences in the amendment procedure under § 1003 and under pre-1997 I.C. § 30-1-59 appeared to be the following:

(1) Whereas Idaho law in the last sentence of § 59(a) specifically allowed shareholders to adopt amendments directly without any directors' participation, the Model Act itself has always provided for initiation by the board and subsequent approval by the shareholders. The 1979 revisers directly addressed this difference and decided to retain the Idaho alternative for direct shareholder amendment. The 1997 revisers again addressed this discrepancy between model and Idaho law and decided to adopt the Model Act approach in subsection (1).

(2) Pre-1997 § 59 required board to act by "resolution" when approving a proposed amendment for submission to shareholders. The Model Act does not require director approval to be in any particular form.

(3) Model Act subsection 1003(2)(a) added a requirement that the board make a recommendation to the shareholders on the desirability of the proposed amendment (or state why it is unable to do so).

(4) Subsection (3) authorized the board to condition its submission to the shareholders.

(5) Subsection (4), consistently with the Model Act's other provisions on shareholder notice, required that all shareholders be notified of any meeting to consider an amendment, including shareholders without voting rights.

(6) Subsection (5) slightly relaxed the pre-1997 voting requirements by applying the majority of shares entitled to vote standard only to amendments that give rise to appraisal rights, and in the case of those amendments, only to the voting group or groups that would have appraisal rights upon the adoption of the amendment. All other amendments were to be approved by the vote required by sections 725 and 726, which simply required votes of a voting group in favor of a proposed amendment to exceed those opposed at a meeting at which a quorum of that voting group is present. A similar vote was required of voting groups that do not have appraisal rights when voting on an amendment which creates appraisal rights for other voting groups.

The 2004 amendments abandoned the old distinction between quorum and approval requirements for different types of amendments. Pre-2004 law differentiated, e.g., between amendments that triggered appraisal rights (requiring separate approval of a majority of the outstanding shares eligible for appraisal rights) and other amendments, which required approval by a majority of the votes cast. New subsection (5) applies the new uniform approval rule for amendments and all other fundamental changes, namely that fundamental changes will be treated alike and may be considered by the shareholders if there is present a quorum made up of a majority of all shares and voting groups entitled to vote. The new uniform approval rule exemplified here in subsection (5) requires only that the transaction (amendment) be approved by a simple majority of those shares actually voted; abstaining shares will not be counted.

30-1-1004. Voting on amendments by voting groups. — Except as otherwise provided in the articles of incorporation:

(1) If a corporation has more than one (1) class of shares outstanding, the holders of the outstanding shares of a class, whether voting or nonvoting in whole or in part, are entitled to vote as a separate voting group, if shareholder voting is otherwise required by this chapter, on a proposed amendment to the articles of incorporation if the amendment would:

(a) Increase or decrease the aggregate number of authorized shares of the class;

(b) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(c) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(d) Change the rights, preferences or limitations of all or part of the shares of the class;

(e) Change the shares of all or part of the class into a different number of shares of the same class;

(f) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior or substantially equal to the shares of the class;

(g) Increase the rights, preferences or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior or substantially equal to the shares of the class;

(h) Limit or deny an existing preemptive right of all or part of the shares of the class; or

(i) Cancel or otherwise affect rights to distributions that have accumulated but not yet been authorized on all or part of the shares of the class.

(2) If a proposed amendment would affect a series of a class of shares in one (1) or more of the ways described in subsection (1) of this section, the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(3) If a proposed amendment that entitles the holders of two (2) or more classes or series of shares to vote as separate voting groups under this section would affect those two (2) or more classes or series in the same or a substantially similar way, the holders of shares of all the classes or series so affected must vote together as a single voting group on the proposed amendment, unless otherwise provided in the articles of incorporation or required by the board of directors.

History.

I.C., § 30-1-1004, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 33, p. 907.

ABA OFFICIAL COMMENT

Unless otherwise provided in the articles of incorporation, section 1004(1) requires separate approval by voting groups for certain types of amendments to the articles of incorporation where the corporation has more than one class of shares outstanding. In general, section 1004 carries forward provisions of the prior Act, but certain changes have been made. Under the prior Act, approval by a class, voting as a separate voting group, was required for an amendment that would increase or decrease the aggregate number of shares of the class. That provision does not appear in the present Act. Also, in the prior Act approval by a class, voting as a separate voting group, was required for an amendment that would create a new class of shares having rights or preferences with respect to dissolution that would be prior, superior, or substantially equal to the class, and for an amendment that would increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, would have rights or preferences with respect to distributions or dissolution that would be prior, superior, or substantially equal to the shares of the class. Under the present Act, approval by a class, voting as a separate voting group, is required in these cases only when the new or other class would have rights with respect to distributions or dissolution that would be prior or superior to the class, not when the rights would be substantially equal.

Shares are entitled to vote as separate voting groups under this section even though they are designated as nonvoting shares in the articles of incorporation, or the articles of incorporation purport to deny them entirely the right to vote on the proposal in question, or purport to allow other classes or series of shares to vote as part of the same voting group. However, an amendment that does not require shareholder approval does not trigger the right to vote by voting groups under this section. This would include a determination by the board of directors, pursuant to authority granted in the articles of incorporation, of the preferences, limitations and relative rights of any class prior to the issuance of any shares of that class, or of one or more series within a class before the issuance of any shares of that series (see section 602(1)).

The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights, or classes or series of limited or nonvoting shares, against amendments that are especially burdensome to that class or series. This section, however, does not make the right to vote by separate voting group dependent on an evaluation of whether the amendment is detrimental to the class or series; if the amendment is one of those described in section 1004(1), the class or series is automatically entitled to vote as a separate voting group on the amendment. The question whether an amendment is detrimental is often a question of

judgment, and approval by the affected class or series is required irrespective of whether the board or other shareholders believe it is beneficial or detrimental to the affected class or series.

Under subsection (1)(e), a class is entitled to vote as a separate voting group on an amendment that would change the shares of all or part of the class into a different number of shares of the same class. An amendment that changes the number of shares owned by one or more shareholders of a class into a fraction of a share, through a "reverse split," falls within subsection (1)(e) and therefore requires approval by the class, voting as a separate voting group, whether or not the fractional share is to be acquired for cash under section 604.

Sections 725 and 726 set forth the mechanics of voting by multiple voting groups.

Subsection (2) extends the privilege of voting by separate voting group to a series of a class of shares if the series has financial or voting provisions unique to the series that are affected in one or more of the ways described in subsection (1). Any significant distinguishing feature of a series, which an amendment affects or alters, should trigger the right of voting by separate voting group for that series. However, under subsection (3) if a proposed amendment that entitles two or more classes or series of shares to vote as separate voting groups would affect those classes or series in the same or a substantially similar way, the shares of all the class or series so affected must vote together, as a single voting group, unless otherwise provided in the articles of incorporation or required by the board of directors.

The application of subsections (2) and (3) may best be illustrated by examples.

First, assume there is a class of shares, with preferential rights, comprised of three series, each with different preferential dividend rights. A proposed amendment would reduce the rate of dividend applicable to the "Series A" shares and would change the dividend right of the "Series B" shares from a cumulative to a noncumulative right. The amendment would not affect the preferential dividend right of the "Series C" shares. Both Series A and B would be entitled to vote as separate voting groups on the proposed amendment; the holders of the Series C shares, not directly affected by the amendment, would not be entitled to vote at all, unless otherwise provided, or unless the shares are voting shares under the articles of incorporation, in which case they would not vote as a separate voting group but in the voting group consisting of all shares with general voting rights under the articles of incorporation.

Second, if the proposed amendment would reduce the dividend right of Series A and change the dividend right of both Series B and C from a cumulative to a noncumulative right, the holders of Series A would be entitled to vote as a single voting group, and the holders of Series B and C would be required to vote together as a single, separate voting group.

Third, assume that a corporation has common stock and two classes of preferred stock. A proposed amendment would create a new class of senior preferred that would have priority in distribution rights over both the common stock and the existing classes of preferred stock. Because the creation of the new senior preferred would affect all three classes of stock in the same or a substantially similar way, all three classes would vote together as a single voting group on the proposed amendment.

Under the prior version of section 1004(3), series that were affected by an amendment in the same or a substantially similar manner were required to vote together, but classes that were affected by an amendment in the same or a substantially similar manner voted separately. Thus under the prior version of section 1004(3) if, in the second example, the A, B, and C stock had been denominated as classes rather than series, then the A, B, and C holders would have been required to vote separately rather than together. Similarly, in the third example, under the prior version of section 1004(3) the Common and existing Preferred would have been required to vote separately rather than together, because each was a separate class. The distinction between classes and series for this purpose seems artificial, and therefore has been eliminated in the current version of section 1004(3).

IDAHO REPORTER'S COMMENT

The most significant difference between Model Act § 1004 and pre-1997 I.C. § 30-1-60 was the subsection (2) and (3) extension of the voting group privilege beyond classes to series within classes.

A less significant difference was the dropping of par value changes from the subsection (1) list of types of proposed amendments that trigger voting group privileges.

In 2004 three substantive changes were made to section 1004. First, the entire section will now be subject to the opening "except as otherwise provided in the articles" condition. Second, subsection (3) has been amended to eliminate the distinction between classes and series of shares. Under I.C. § 30-1-1004 (3) as it existed from 1997 to 2004, if two or more series of shares were affected in substantially the same way, they had to vote together on the proposed amendment. But classes are always entitled to a separate group vote, even if multiple classes

would be similarly affected by the amendment. Under amended section 1004 (3), classes and series are treated alike in determining the relevant voting groups for a proposed amendment that would affect one or more classes or series "in the same or a substantially similar way." They are now all to be consolidated in a single voting group.

The third 2004 change in section 1004 was a slight narrowing of the list of amendments that trigger group voting. The amendment eliminates any need for group voting on an amendment that does nothing more than change the "designation" of a particular class without changing any rights, preferences or limitations of any such class.

30-1-1005. Amendment by board of directors. — Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt amendments to the corporation's articles of incorporation without shareholder approval:

(1) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(2) To delete the names and addresses of the initial directors;

(3) To change the information required by section 30-405, Idaho Code, on its registered agent;

(4) If the corporation has only one (1) class of shares outstanding:

(a) To change each issued and unissued authorized share of the class into a greater number of whole shares of that class; or

(b) To increase the number of authorized shares of the class to the extent necessary to permit the issuance of shares as a share dividend;

(5) To change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution for the name;

(6) To reflect a reduction in authorized shares, as a result of the operation of section 30-1-631(2), Idaho Code, when the corporation has acquired its own shares and the articles of incorporation prohibit the reissue of the acquired shares;

(7) To delete a class of shares from the articles of incorporation, as a result of the operation of section 30-1-631(2), Idaho Code, when there are no remaining shares of the class because the corporation has acquired all shares of the class and the articles of incorporation prohibit the reissue of the acquired shares; or

(8) To make any change expressly permitted by section 30-1-602(1) or (2), Idaho Code, to be made without shareholder approval.

History.

I.C., § 30-1-1005, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 31, p. 907; am. 2007, ch. 314, § 11, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (3), which formerly read: "To delete the name and address of the initial registered agent or registered office, if a statement of change is on file or if an annual report has been filed with the secretary of state."

Compiler's Notes.

This section was formerly compiled as § 30-1-1002.

Former § 30-1-1005 was amended and redesignated as § 30-1-1002.

ABA OFFICIAL COMMENT

The amendments described in clauses (1) through (8) are so routine and "housekeeping" in nature as not to require approval by shareholders. None affects substantive rights in any meaningful way.

Section 1005(4)(a) authorizes the board of directors to change each issued and unissued share of an outstanding class of shares into a greater number of whole shares if the corporation has only that class of shares outstanding. All shares of the class being changed must be treated identically under this clause. Section 1005(4)(b) authorizes the board of directors to increase the number of shares of the class to the extent necessary to permit the issuance of shares as a share dividend, if the corporation has only that one class of stock outstanding.

Amendments provided for in this section may be included in restated articles of incorporation under section 1007 or in articles of merger under part 11.

IDAHO REPORTER'S COMMENT

When added in Idaho in 1997, section 1005 (then 1002) recognized a relatively minor matter not dealt with in traditional corporation statutes like Idaho's pre-1997 version of the prior Model Act, namely, that some amendments to the articles are so insignificant that turning them over to directorial action alone seems appropriate.

The 1997 version added to the ABA Official Text in subsection (3) the words "or if an annual report has been filed."

Amended section 1005 was renumbered (from section 1002 in the prior version) and added to as part of the extensive revisions of the fundamental changes provisions in 2004. The additions included a new subsection (4) (b), authorizing the board of a "one class company" to increase the number of shares needed to permit a stock dividend. Also new were subsections (6) and (7), which allow the board to reduce authorized shares or to delete a class in connection with a corporate repurchase of shares under amended section 631, discussed above.

30-1-1006. Articles of amendment. — After an amendment to the articles of incorporation has been adopted and approved in the manner required by this chapter and by the articles of incorporation, the corporation shall deliver to the secretary of state for filing articles of amendment, which shall set forth:

(1) The name of the corporation;

(2) The text of each amendment adopted;

(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) The date of each amendment's adoption; and

(5) If an amendment:

(a) Was adopted by the incorporators or board of directors without shareholder approval, a statement that the amendment was duly approved by the incorporators or by the board of directors, as the case may be, and that shareholder approval was not required;

(b) Required approval by the shareholders, a statement that the amendment was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation; or

(c) Is being filed pursuant to section 30-1-120(11)(e), Idaho Code, a statement to that effect.

History.

I.C., § 30-1-1006, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 35, p. 907.

ABA OFFICIAL COMMENT

Section 1006(3) requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids any possible confusion that may arise as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability, with transitional provisions having no long-range effect appearing only in the articles of amendment.

IDAHO REPORTER'S COMMENT

The requirements for the articles of amendment under Model Act § 1006 closely follow those under pre-1997 I.C. § 30-1-61, but the reporting requirement for the vote on an amendment has been changed significantly. Subsection (g) of Idaho's pre-1997 act is eliminated. It provided that, if an amendment changed the amount of stated capital, the articles must set forth both the manner and amount of the change. Again, as with § 1004 above, this change resulted from the elimination of par value throughout the new Model Act.

Section 62 of Idaho pre-1997 act dealt with filing procedures which are now covered in part 1 of the Model Act.

In addition to stylistic changes, the 2004 amendments to section 1006 greatly simplified the vote reporting requirements in articles of amendment. New subsection (5)(b) [corresponding to our 1997 to 2004 subsection (6)] merely requires a statement that the amendment was duly approved by the shareholders, in lieu of our old requirement that the articles of amendment report the actual vote count by voting groups.

30-1-1007. Restated articles of incorporation. — (1) A corporation's board of directors may restate its articles of incorporation at any time, with or without shareholder approval, to consolidate all amendments into a single document.

(2) If the restated articles include one (1) or more new amendments that require shareholder approval, the amendments must be adopted and approved as provided in section 30-1-1003, Idaho Code.

(3) A corporation that restates its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate which states that the restated articles consolidate all amendments into a single document and, if a new amendment is included in the restated articles, which also includes the statements required under section 30-1-1006, Idaho Code.

(4) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments thereto.

(5) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (3) of this section.

History.

I.C., § 30-1-1007, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 36, p. 907.

ABA OFFICIAL COMMENT

Restated articles of incorporation serve the useful purpose of permitting articles of incorporation that have been amended from time to time, or are being concurrently amended, to be consolidated into a single document.

A restatement of a corporation's articles of incorporation is not an amendment of the articles of incorporation, but only a consolidation of amendments into a single document. A corporation that is restating its articles may concurrently amend the articles, and include the new

amendments in the restated articles. In such a case, the provisions of this part that govern amendments of the articles of incorporation would apply to the new amendments. In case of doubt whether a provision of a restatement of the articles of incorporation might be deemed to be an amendment, rather than a consolidation, the prudent course for the corporation is to treat that provision as an amendment, and follow the procedures that apply to amendments under this part.

Where the articles of incorporation are amended at the same time they are restated, a combined articles of amendment and restatement may be filed.

IDAHO REPORTER'S COMMENT

Model Act § 1007 combined into a single provision the substance of pre-1997 I.C. §§ 30-159(a), 3rd sentence, and 64. Section 1007 generally followed the substance of Idaho's pre-1997 provisions on restated articles, but it did add a provision authorizing the corporation to choose to submit any restatement (whether adding an amendment or not) to the shareholders for their approval under § 1003. This provision was deleted in 2004.

The requirement in Idaho's pre-1997 § 64 that the secretary of state find that the restatement "conform to law" was eliminated.

The filing procedures that appeared in old § 64 are generally codified for the entire Model Act in part 1.

The 2004 amendments here (1) simplify the prior version and (2) delete the provision described above [pre-existing I.C. § 30-1-1007 (3)] for submitting restated articles to a shareholder vote. This second change makes it clear that restating the articles of incorporation is a director's function and does not require any shareholder vote.

30-1-1008. Amendment pursuant to reorganization. — (1) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under the authority of a law of the United States.

(2) The individual or individuals designated by the court shall deliver to the secretary of state for filing articles of amendment setting forth:

(a) The name of the corporation;

(b) The text of each amendment approved by the court;

(c) The date of the court's order or decree approving the articles of amendment;

(d) The title of the reorganization proceeding in which the order or decree was entered; and

(e) A statement that the court had jurisdiction of the proceeding under federal statute.

(3) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

History.

I.C., § 30-1-1008, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 37, p. 907.

ABA OFFICIAL COMMENT

Section 1008 provides a simplified method of conforming corporate documents filed under state law with the federal statutes relating to corporate reorganization. If a federal court confirms a plan of reorganization that requires articles of amendment to be filed, those amendments may be prepared and filed by the persons designated by the court and the approval of neither the shareholders nor the board of directors is required.

This section applies only to amendments in articles of incorporation approved before the entry of a final decree in the reorganization.

IDAHO REPORTER'S COMMENT

The basic idea here is to coordinate State corporation law with the various Federal statutes dealing with corporate reorganization (primarily bankruptcy and S.E.C. provisions). Where the interests of stockholders are altered or eliminated in reorganization under the Bankruptcy Act, e.g., it will almost always be difficult, if not impossible, to obtain a shareholder vote for any amendment necessary to implement the reorganization plan. If State law didn't permit amendment in such circumstances without a shareholder vote, then a new corporation would have to be formed to carry out the reorganization plan.

Pre-1997 I.C. § 30-1- 65 contained a "laundry list" of types of amendments that could be made in connection with such reorganization and also included procedures for filing with the secretary of state. Model Act § 1008 eliminates the laundry list as unnecessary; the filing requirements now appear in part 1 for the entire Model Act. Subsection (4) was new in 1997.

The only substantive change in the 2004 revision was elimination of 1997-2004 subsection (3) relating to appraisal rights, which are covered exclusively by amended part 13. The only other 2004 changes to section 1008 were for purposes of style and simplification.

30-1-1009. Effect of amendment. — An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

History.

I.C., § 30-1-1009, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 38, p. 907.

ABA OFFICIAL COMMENT

Under section 1009, amendments to articles of incorporation do not interrupt the corporate existence and do not abate a proceeding by or against the corporation even though the amendment changes the name of the corporation.

Amendments are effective when filed unless a delayed effective date is elected. See section 123.

IDAHO REPORTER'S COMMENT

This new Model Act § 1009 on the effect of an amendment is substantially the same as the second paragraph of prior I.C. § 30-1-63.

The first paragraph of old § 63 dealt with effective dates of amendments. This matter is dealt with generally in § 123 of the new Model Act, which provides that amendments are effective when filed unless a delayed effective date is elected. Such delay can be up to 90 days under § 123 as compared to 30 days under old § 63.

30-1-1010 — 30-1-1019. [Reserved.]

30-1-1020. Amendment by board of directors or shareholders. — (1) A corporation's shareholders may amend or repeal the corporation's bylaws.

(2) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

(a) The articles of incorporation or section 30-1-1021, Idaho Code, reserve that power exclusively to the shareholders in whole or part; or

(b) The shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.

History.
I.C., § 30-1-1020, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 39, p. 907.

ABA OFFICIAL COMMENT

The power to amend or repeal bylaws is shared by the board of directors and the shareholders, unless that power is reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. Section 1020(2)(a) provides that the power to amend or repeal the bylaws may be reserved to the shareholders "in whole or part." This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws.

Section 1020(2)(b) permits the shareholders to amend, repeal, or adopt a bylaw and reserve exclusively to themselves the power to amend, repeal, or reinstate that bylaw if the reservation is express.

Section 1021 limits the power of directors to adopt or amend supermajority provisions in bylaws. See section 1021 and the Official Comment thereto.

IDAHO REPORTER'S COMMENT

The new Model Act separates adoption of original bylaws (§ 206) from amendment (this § 1020); adoption and amendment were dealt with together in prior I.C. § 30-1-27.

Section 1020 substantially rewrites the second sentence of old § 27. For example, under the language of old § 27 there was some uncertainty about the relative roles of shareholders and the board in the amendment of bylaws in the relatively unusual situation where these two groups may be at odds. Section 1020 seems a useful clarification in this regard.

30-1-1021. Bylaw increasing quorum or voting requirement for directors. — (1) A bylaw that increases a quorum or voting requirement for the board of directors may be amended or repealed:

(a) If originally adopted by the shareholders, only by the shareholders unless the bylaws otherwise provide;

(b) If adopted by the board of directors, either by the shareholders or by the board of directors.

(2) A bylaw adopted or amended by the shareholders that increases a quorum or voting requirement for the board of directors may provide that it can be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(3) Action by the board of directors under subsection (1) of this section to amend or repeal a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

History.
I.C., § 30-1-1022, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 41, p. 907.

STATUTORY NOTES

Prior Laws.
Former § 30-1-1021, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 40.

Compiler's Notes.
This section was formerly compiled as § 30-1-1022.

ABA OFFICIAL COMMENT

Provisions that increase a quorum or voting requirement for the board over the requirement that would otherwise apply under this Act or that was previously set forth in the bylaws ("super-majority requirements") may be placed in the bylaws of the corporation without specific authorization in the articles of incorporation. See section 824(1) and (3). Like other bylaw provisions, they may be adopted either by the shareholders or by the board of directors. See section 1020. Such provisions may be amended or repealed by the board of directors or shareholders as provided in this section.

Section 1021(1)(a) provides that if a supermajority requirement is imposed by a bylaw adopted by the shareholders, only the shareholders may amend or repeal it. Under section 1021(2), such a bylaw may impose restrictions on the manner in which it may be thereafter amended or repealed by the shareholders. If a supermajority requirement is imposed in a bylaw adopted by the board of directors, the bylaw may be amended either by the shareholders or the board of directors (see section 1021(1)(b)). However, if such an amendment is amended by the board of directors, section 1021(3) requires approval by the supermajority requirement then in effect or proposed to be adopted, whichever is greater. Compare section 727.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997 prior section 1021 was an entirely new section, specifying in great detail what apparently could be accomplished under pre-1997 law, this time old I.C. §§ 30-1-27 and 40. For those who might want to increase director quorum or voting requirements by bylaw, the specific details seemed a good idea.

In 2004 this provision for bylaw "stiffening" of quorum or voting requirements for director action was renumbered from section 1022, and old section 1021 (allowing bylaw amendments to increase quorum or vote requirements for shareholder action) was deleted.

30-1-1022. [Amended and Redesignated.]

STATUTORY NOTES

Compiler's Notes.
Former § 30-1-1022 was amended and redesignated as § 30-1-1021 by S.L. 2004, ch. 324, § 41.

Part 11. Merger and Share Exchange

30-1-1100. Applicability of Idaho entity transactions act. — (1) Unless excluded therefrom by section 30-18-110, Idaho Code, and except as provided in subsection (2) of this section, a merger or a share exchange in which a corporation is a party is governed by the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

(2) Sections 30-1-1104 and 30-1-1105, Idaho Code, apply to transactions in which a corporation is a party under the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

History.
I.C., § 30-1-1100, as added by 2007, ch. 116, § 3, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-1-1101. Definitions. — As used in this part:

(1) "Merger" means a business combination pursuant to section 30-1-1102, Idaho Code.

(2) "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation or eligible entity that will:

(a) Merge under a plan of merger;

(b) Acquire shares or eligible interests of another corporation or an eligible entity in a share exchange; or

(c) Have all of its shares or eligible interests or all of one (1) or more classes or series of its shares or eligible interests acquired in a share exchange.

(3) "Share exchange" means a business combination pursuant to section 30-1-1103, Idaho Code.

(4) "Survivor" in a merger means the corporation or eligible entity into which one (1) or more other corporations or eligible entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

History.
I.C., § 30-1-1101, as added by 2004, ch. 324, § 42, p. 907.

STATUTORY NOTES

Compiler's Notes.
Former § 30-1-1101 was amended and redesignated as § 30-1-1102 in 2004.

ABA OFFICIAL COMMENT

1. IN GENERAL. The definition of what constitutes an "eligible entity" in section 140(10) determines the kinds of entities, other than corporations, with which a corporation may merge. The definition of "voting power" in section 140 also has important substantive implications, because whether shareholder approval is required for a transaction under part 11 depends in part on the proportion of voting power that is carried by shares that would be issued and issuable as a result of the transaction.

2. INTERESTS. The term "interests" as defined in section 140(22) includes such interests as general and limited partnership interests in limited partnerships, equity interests in limited liability companies, and any other form of equity or ownership interests in an unincorporated entity, as defined in section 140(45), however denominated. For purposes of this part, the definition of "eligible interests" in section 140(11) adds to those types of interests any form of membership in a domestic or foreign non-profit corporation.

3. ORGANIC DOCUMENTS. The definition of the term "organic document" is set forth in section 140(29).

4. SURVIVOR. The term "survivor" is used in part 11 as a defined technical term and therefore is not always used in a manner that is equivalent to the ordinary meaning of the term. For example, a corporation may be the "survivor" of a merger within the meaning of section 1101(4) even if it is created by the merger, and therefore had no existence before the merger.

IDAHO REPORTER'S COMMENT

Until the 2004 amendments, Idaho had no comparable separate section with definitions specific to mergers and share exchanges. It should also be noted that many definitions of terms

used in amended part 11 appear in amended section 30-1-140, the general definitions section, above.

30-1-1102. Merger. — (1) One (1) or more domestic business corporations may merge with one (1) or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two (2) or more foreign business corporations or domestic or foreign eligible entities may merge into a new domestic business corporation to be created in the merger in the manner provided in this part.

(2) A foreign business corporation, or a foreign eligible entity, may be a party to a merger with a domestic business corporation, or may be created by the terms of the plan of merger, only if the merger is permitted by the foreign business corporation or eligible entity. If the organic law of a domestic eligible entity does not provide procedures for the approval of a merger, a plan of merger may be adopted and approved, the merger effectuated, and appraisal rights exercised in accordance with the procedures in this part and part 13 of this chapter. For the purposes of applying this part and part 13 of this chapter:

(a) The eligible entity, its members or interest holders, eligible interests and organic documents taken together shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and

(b) If the business and affairs of the eligible entity are managed by a group of persons that is not identical to the members or interest holders, that group shall be deemed to be the board of directors.

(3) The plan of merger must include:

(a) The name of each domestic or foreign business corporation or eligible entity that will merge and the name of the domestic or foreign business corporation or eligible entity that will be the survivor of the merger;

(b) The terms and conditions of the merger;

(c) The manner and basis of converting the shares of each merging domestic or foreign business corporation and eligible interests of each merging domestic or foreign eligible entity into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property or any combination of the foregoing;

(d) The articles of incorporation of any domestic or foreign business or nonprofit corporation, or the organic documents of any domestic or foreign unincorporated entity, to be created by the merger, or if a new domestic or foreign business or nonprofit corporation or unincorporated entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organic documents; and

(e) Any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organic document of any such party.

(4) Terms of a plan of merger may be made dependent upon facts objectively ascertainable outside the plan in accordance with section 30-1-120(11), Idaho Code.

(5) The plan of merger may also include a provision that the plan may be amended prior to filing articles of merger, but if the shareholders of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change:

(a) The amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, or other property to be received under the plan by the shareholders of or owners of eligible interests in any party to the merger;

(b) The articles of incorporation of any corporation, or the organic documents of any unincorporated entity, that will survive or be created as a result of the merger, except for changes permitted by section 30-1-1005, Idaho Code, or by comparable provisions of the organic laws of any such foreign corporation or domestic or foreign unincorporated entity; or

(c) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

History.

I.C., § 30-1-1101, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 43, p. 907.

STATUTORY NOTES

Compiler's Notes.

This section was formerly compiled as § 30-1-1101.

Former § 30-1-1102 was amended and redesignated as § 30-1-1103.

ABA OFFICIAL COMMENT

1. IN GENERAL. Section 1102 authorizes mergers between one or more domestic corporations, or between one or more domestic corporations and one or more foreign corporations or domestic or foreign eligible entities. Upon the effective date of the merger the survivor becomes vested with all the assets of the corporations or eligible entities that merge into the survivor and becomes subject to their liabilities, as provided in section 1107.

2. APPLICABILITY. A merger of a domestic corporation with a foreign corporation or a foreign eligible entity is authorized by part 11 only if the merger is permitted by the laws under which the foreign corporation or eligible entity is organized, and in effecting the merger the foreign corporation or eligible entity complies with such laws. Whether and on what terms a foreign corporation or a foreign eligible entity is authorized to merge with a domestic corporation is a matter that is governed by the laws under which that corporation or eligible entity is organized or by which it is governed, not by part 11.

Nevertheless, certain provisions of part 11 have an indirect effect on a foreign corporation or foreign eligible entity that proposes to or does merge with a domestic corporation, because they set conditions concerning the effectiveness and effect of the merger. For example, section 1102(3) sets forth certain requirements for the contents of a plan of merger. This section is directly applicable only to domestic corporations, but has an indirect effect on a foreign corporation or foreign eligible entity that is a party to a proposed merger with a domestic corporation.

In some cases, the impact of part 11 on a foreign corporation or foreign eligible entity is more direct. For example, section 1107(4) provides that upon a merger becoming effective, a foreign corporation or foreign eligible entity that is the survivor of the merger is deemed to appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger to exercise appraisal rights and to agree that it will promptly pay to such shareholders the amount, if any, to which they are entitled under part 13.

If the law under which a domestic eligible entity is organized does not expressly authorize it to merge with a domestic business corporation, it is intended that section 1102(1) will provide the necessary authority. Until such time as the various laws governing the organization of each

form of eligible entity have been amended to provide procedures for adopting and approving a plan of merger, subsection (2) provides those procedures by reference to the provisions of parts 11 and 13 applicable to domestic business corporations.

3. TERMS AND CONDITIONS OF MERGER. Part 11 imposes virtually no restrictions or limitations on the terms or conditions of a merger, except for those set forth in section 1102(5) concerning provisions in a plan of merger for amendment of the plan after it has been approved by shareholders. Owners of shares or interests in a party to the merger that merges into the survivor may receive shares or other securities of the survivor, shares or other securities of a party other than the survivor, interests, obligations, rights to acquire shares or other securities, cash, or other property. The capitalization of the survivor may be restructured in the merger, and its articles or organizational documents may be amended by the articles of merger, in any way deemed appropriate.

Although part 11 imposes virtually no restrictions or limitations on the terms or conditions of a merger, section 1102(3) requires that the terms and conditions be set forth in the plan of merger. The present Act clarifies that the plan of merger need not be set forth in the articles of merger that are to be delivered to the secretary of state for filing after the merger has been adopted and approved. See section 1106.

Section 1102(3)(d) provides that a plan of merger must set forth the articles of incorporation of any corporation, and the organizational documents of any eligible entity, to be created by the merger, or if a new corporation or eligible entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organizational documents. If a domestic corporation is merged into an existing domestic or foreign corporation or eligible entity, section 1102(3) does not require that the survivor's articles of incorporation or organizational documents be included in the plan of merger. However, if approval of the plan of merger by the shareholders of a domestic corporation to be merged into another party to the merger is required under section 1104, section 1104(4) requires that the shareholders be furnished with a copy or summary of those articles of incorporation or organizational documents in connection with voting on approval of the merger.

The list in section 1102(3) of required provisions in a plan of merger is not exhaustive and the plan may include any other provisions that may be desired.

4. AMENDMENTS OF ARTICLES OF INCORPORATION. Under section 1102, a corporation's articles of incorporation may be amended by a merger. Under section 1102(3)(d), a plan of merger must include any amendments to the survivor's articles of incorporation or organizational documents. If the plan of merger is approved, the amendments will be effective.

5. ADOPTION AND APPROVAL; ABANDONMENT. A merger must be adopted and approved as set forth in sections 1104 and 1105. Under section 1108, the board of directors may abandon a merger before its effective date even if the plan of merger has already been approved by the corporation's share-holders.

6. EFFECTIVE DATE OF MERGER. A merger takes effect on the date the articles of merger are filed, unless a later date, not more than 90 days after filing, is specified in the articles. See section 1106 and the Official Comment thereto.

7. APPRAISAL RIGHTS. Shareholders of a domestic corporation that is a party to a merger may have appraisal rights. See part 13.

8. PROTECTION OF RESTRICTED PROPERTY. This section permits a nonprofit corporation or unincorporated nonprofit association to merge into a for-profit corporation or unincorporated entity. The laws of some states governing the nondiversion of charitable and trust property to other uses may not be worded in a fashion that will cover a merger under section 1102.

IDAHO REPORTER'S COMMENT

The 2004 amendments to part 11 were numerous and significant. Most mundanely, the numeration of the sections was changed with the addition of a new section 1101 on definitions, above. Specifically with reference to section 1102 (1101 from 1997 to 2004), the following seem the most important of the 2004 changes: (1) The long trend of expanding the very nature of statutory mergers continued spectacularly with the authorization of mergers between corporations and "eligible entities," defined in section 140(10) as "domestic or foreign unincorporated entities or domestic or foreign nonprofit corporations." Limited liability companies had already been included in Idaho in the 1997 revisions.

(2) Merger provisions relating to foreign corporations, previously covered separately in old section 1107, were consolidated into amended section 1102.

(3) Section 1102(4) was added to take account of the expanded use of extrinsic facts permitted by section 120(11) above.

(4) Section 1102(5) was added, relating to amendment of a plan of merger before articles of merger are filed.

Another matter worth noting here is the Model Act's dropping of any reference to "consolidations." Cf. pre-1997 I.C. 30-1-72 et seq. The idea seems to be that consolidations have become obsolete in modern corporate practice because it is nearly always advantageous for one of the parties to be the surviving corporation, and, if not, a new entity can be created before the merger and the disappearing entities merged into it.

30-1-1103. Share exchange. — (1) Through a share exchange:

(a) A domestic corporation may acquire all of the shares of one (1) or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one (1) or more classes or series of interests of a domestic or foreign eligible entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange; or

(b) All of the shares of one (1) or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or eligible entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.

(2) A foreign corporation, or a domestic or foreign eligible entity, may be a party to a share exchange only if the share exchange is permitted by the organic law the corporation or eligible entity is organized under or by which it is governed. If the organic law of a domestic eligible entity does not provide procedures for the approval of a share exchange, a plan of share exchange may be adopted and approved, and the share exchange effectuated, in accordance with the procedures, if any, for a merger. If the organic law of a domestic eligible entity does not provide procedures for the approval of either a share exchange or a merger, a plan of share exchange may be adopted and approved, the share exchange effectuated, and appraisal rights exercised, in accordance with the procedures in this part and part 13 of this chapter. For the purposes of applying this part and part 13:

(a) The eligible entity, its interest holders, interests and organic documents taken together shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and

(b) If the business and affairs of the eligible entity are managed by a group of persons that is not identical to the interest holders, that group shall be deemed to be the board of directors.

(3) The plan of share exchange must include:

(a) The name of each corporation or eligible entity whose shares or interests will be acquired and the name of the corporation or eligible entity that will acquire those shares or interests;

(b) The terms and conditions of the share exchange;

(c) The manner and basis of exchanging shares of a corporation or interests in an eligible entity whose shares or interests will be acquired under the share exchange into shares or other securities, interests,

obligations, rights to acquire shares, other securities, or interests, cash, other property, or any combination of the foregoing; and

(d) Any other provisions required by the laws under which any party to the share exchange is organized or by the articles of incorporation or organic document of such party.

(4) Terms of a plan of share exchange may be made dependent upon facts objectively ascertainable outside the plan in accordance with section 30-1-120(11), Idaho Code.

(5) The plan of exchange may also include a provision that the plan may be amended prior to filing articles of share exchange, but if the shareholders of a domestic corporation that is a party to the share exchange are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change:

(a) The amount or kind of shares or other securities, interests, obligations, rights to acquire shares, other securities or interests, cash, or other property to be issued by the corporation or to be received under the plan by the shareholders of or owners of interests in any party to the share exchange; or

(b) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

(6) This section does not limit the power of a domestic corporation to acquire another corporation or interests in an eligible entity in a transaction other than a share exchange.

History.

I.C., § 30-1-1102, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 44, p. 907.

STATUTORY NOTES

Compiler's Notes.

This section was formerly compiled as § 30-1-1102.

Former § 30-1-1103 was amended and redesignated as § 30-1-1104.

ABA OFFICIAL COMMENT

1. IN GENERAL. It is often desirable to structure a corporate combination so that the separate existence of one or more parties to the combination does not cease although another corporation or eligible entity obtains ownership of the shares or interests of those parties. This objective is often particularly important in the formation of insurance and bank holding companies, but is not limited to those contexts. In the absence of the procedure authorized in section 1103, this kind of result often can be accomplished only by a reverse triangular merger, which involves the formation by a corporation, A, of a new subsidiary, followed by a merger of that subsidiary into another party to the merger, B, effected through the exchange of A's securities for securities of B. Section 1103 authorizes a more straightforward procedure to accomplish the same result.

Under section 1103, the acquiring corporation in a share exchange must acquire all of the shares or interests of the class or series of shares or interests that is being acquired. The shares or interests of one or more other classes or series of the acquired corporation or eligible entity may be excluded from the share exchange or may be included on different bases. After the plan of share exchange is adopted and approved as required by section 1104, it is binding on all holders of the class or series to be acquired. Accordingly, a share exchange may operate in a mandatory fashion on some holders of the class or series of shares or interests acquired.

Section 1103(6) makes clear that the authorization of share exchange combinations under

section 1103 does not limit the power of corporations to acquire shares or interests without using the share exchange procedure, either as part of a corporate combination or otherwise.

In contrast to mergers, the articles of incorporation of a party to a share exchange may not be amended by a plan of share exchange. Such an amendment may, however, be effected under part 10 as a separate element of a corporate combination that involves a share exchange.

2. APPLICABILITY. Whether and on what terms a foreign corporation or a foreign eligible entity is authorized to enter into a share exchange with a domestic corporation is a matter that is governed by the laws under which that corporation or eligible entity is organized or by which it is governed, not by part 11. Therefore, for example, section 1104, which governs the manner in which a plan of share exchange must be adopted, applies only to adoption of a plan of share exchange by a domestic corporation.

Nevertheless, certain provisions of part 11 have an indirect effect on a foreign corporation or foreign eligible entity that proposes to or does engage in a share exchange with a domestic corporation, because they set conditions concerning the effectiveness and effect of the share exchange. For example, section 1103(3) sets forth certain requirements for the contents of a plan of share exchange. This section is directly applicable only to domestic corporations, but has an indirect effect on a foreign corporation or foreign eligible entity that is a party to a proposed share exchange with a domestic corporation.

If the law under which a domestic eligible entity is organized does not expressly authorize it to participate in a share (or interest) exchange with a domestic business corporation, it is intended that section 1103(1) will provide the necessary authority. Until such time as the various laws governing the organization of each form of eligible entity have been amended to provide procedures for adopting and approving a plan of share (or interest) exchange, subsection (2)(a) provides those procedures by reference to the provisions of parts 11 and 13 applicable to domestic business corporations.

3. TERMS AND CONDITIONS OF SHARE EXCHANGE. Part 11 imposes virtually no restrictions or limitations on the terms or conditions of a share exchange, except for those contained in section 1103(5) concerning provisions in a plan of share exchange for amendment of the plan after it has been approved by shareholders, and the requirement in section 1103(1) that the acquiring party must acquire all the shares of the acquired class or series of stock or interests. Owners of shares or interests in a party whose shares are acquired under Section 1103(1)(b) may receive securities or interests of the acquiring party, securities or interests of a party other than the acquiring party, or cash or other property.

Although part 11 imposes virtually no restrictions or limitations on the terms or conditions of a share exchange, section 1103(3) requires that the terms and conditions be set forth in the plan of share exchange. The present Act clarifies that the plan of share exchange need not be set forth in the articles of share exchange that are to be delivered to the secretary of state for filing after the share exchange has been adopted and approved. See section 1106.

The list in section 1103(3) of required provisions in a plan of share exchange is not exhaustive and the plan may include any other provisions that may be desired.

4. ADOPTION AND APPROVAL; ABANDONMENT. A share exchange must be adopted and approved as set forth in section 1104. Under section 1108, the board of directors may abandon a share exchange before its effective date even if the plan of share exchange has already been approved by the corporation's shareholders.

5. EFFECTIVE DATE OF SHARE EXCHANGE. A share exchange takes effect on the date the articles of share exchange are filed, unless a later date, not more than 90 days after filing, is specified in the articles. See section 1106 and the Official Comment thereto.

6. APPRAISAL RIGHTS. Holders of a class or series of shares of a domestic corporation that is acquired in a share exchange may have appraisal rights. See part 13.

IDAHO REPORTER'S COMMENT

This section, which facilitates "B" reorganizations under I.R.C. §368 as well as the maintenance of the separate existence of acquired companies, was amended in 2004 to coordinate with other 2004 amendments. For example, the breadth of the section has been increased to parallel that for mergers under amended section 1102 (discussed above). So, as in the case of mergers, "exchanges" may be made with "eligible entities," as well as with foreign corporations.

Section 1103 (4) was also amended in 2004 to conform to other amendments related to the broadened use of extrinsic facts permitted by section 120(11).

30-1-1104. Action on a plan of merger or share exchange. — In the case of a domestic corporation that is a party to a merger or share exchange:

(1) The plan of merger or share exchange must be adopted by the board of directors.

(2) Except as provided in subsection (7) of this section and in section 30-1-1105, Idaho Code, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

(3) The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

(4) If the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing corporation or eligible entity, the notice shall also include or be accompanied by a copy or summary of the articles of incorporation or organizational documents of that corporation or eligible entity. If the corporation is to be merged into a corporation or eligible entity that is to be created pursuant to the merger, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or eligible entity.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (3) of this section, requires a greater vote or a greater number of votes to be present, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the plan exists, and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each such separate voting group at a meeting at which a quorum of the voting group consisting of at least a majority of the votes entitled to be cast on the merger or share exchange by that voting group is present.

(6) Separate voting by voting groups is required:

(a) On a plan of merger, by each class or series of shares that:

(i) Are to be converted under the plan of merger into other securities, interests, obligations, rights to acquire shares, other securities or interests, cash, other property, or any combination of the foregoing; or

(ii) Would be entitled to vote as a separate group on a provision in the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under section 30-1-1004, Idaho Code;

(b) On a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group; and

(c) On a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange.

(7) Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if:

(a) The corporation will survive the merger or is the acquiring corporation in a share exchange;

(b) Except for amendments permitted by section 30-1-1005, Idaho Code, its articles of incorporation will not be changed;

(c) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of change; and

(d) The issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under section 30-1-621(6), Idaho Code.

(8) If as a result of a merger or share exchange one (1) or more shareholders of a domestic corporation would become subject to owner liability for the debts, obligations or liabilities of any other person or entity, approval of the plan of merger or share exchange shall require the execution, by each such shareholder, of a separate written consent to become subject to such owner liability.

History.

I.C., § 30-1-1103, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 45, p. 907.

STATUTORY NOTES

Compiler's Notes.

This section was formerly compiled as § 30-1-1103.

Former § 30-1-1104 was amended and redesignated as § 30-1-1105.

ABA OFFICIAL COMMENT

1. IN GENERAL. Under section 1104, a plan of merger or share exchange must be adopted by the board. Thereafter, the board must submit the plan to the shareholders for their approval, unless the conditions stated in section 1104(7) or section 1105 are satisfied. A plan of share exchange must always be approved by the shareholders of the class or series that is being acquired in a share exchange. Similarly, a plan of merger must always be approved by the shareholders of a corporation that is merged into another party in a merger, unless the corporation is a subsidiary and the merger falls within section 1105. However, under section 1104(7) approval of a plan of merger or share exchange by the shareholders of a surviving corporation in a merger or of an acquiring corporation in a share exchange is not required if the conditions stated in that section, including the fundamental rule of section 621(6), are satisfied.

Section 1104(6) provides that a class or series has a right to vote on a plan of merger as a separate voting group if, pursuant to the merger, the class or series would be converted into other securities, interests, obligations, rights to acquire shares, other securities or interests, cash, or other property. A class or series also is entitled to vote as a separate voting group if the class or series would be entitled to vote as a separate group on a provision in the plan that, if contained in an amendment to the articles of incorporation, would require approval by that class or series, voting as a separate voting group, under section 1004. Under this latter requirement, a class or series will be entitled to vote as a separate voting group if the terms of that class or series are being changed or the shares of that class or series are being converted into shares of any other class or series. Where the surviving entity is a foreign business

corporation, it is not intended that immaterial changes in the terms of a class or series that conform to the usage of the laws of the foreign jurisdiction will alone create an entitlement to vote as a separate group.

Under section 1004, and therefore under section 1104(6), if a change that requires voting by separate voting groups affects two or more classes or two or more series in the same or a substantially similar way, the relevant classes or series vote together, rather than separately, on the change. If separate voting by voting groups is required for a merger or a share exchange under section 1104(6), it will not be excused by section 1104(7). For the mechanics of voting where voting by voting groups is required under section 1104(6), see sections 725 and 726 and the Official Comments thereto.

If a merger would amend the articles of incorporation in such a way as to affect the voting requirements on future amendments, the transaction must also be approved by the vote required by section 727.

2. SUBMISSION TO THE SHAREHOLDERS. Section 1104(2) requires the board of directors, after having adopted the plan of merger or share exchange, to submit the plan of merger or share exchange to the shareholders for approval, except as provided in subsection (7) and section 1105. When submitting the plan of merger or share exchange the board of directors must make a recommendation to the shareholders that the plan be approved, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation. For example, the board or directors may make such a determination where there is not a sufficient number of directors free of a conflicting interest to approve the transaction or because the board of directors is evenly divided as to the merits of a transaction but is able to agree that shareholders should be permitted to consider the transaction. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances, and communicate the basis for the determination, when submitting the plan of merger or share exchange to the shareholders. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, shareholders should not be asked to act on a merger or share exchange in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of shareholders.

Section 1104(3) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis. Among the conditions that a board might impose are that the plan will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders or (ii) if shareholders holding more than a specified fraction of the outstanding shares assert appraisal rights. The board of directors is not limited to conditions of these types.

Section 1104(4) provides that if the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted. Requirements concerning the timing and content of a notice of meeting are set out in section 705. Section 1104(4) does not itself require that notice be given to nonvoting shareholders where the merger is approved, without a meeting, by unanimous consent. However, that requirement is imposed by section 704(4).

3. QUORUM AND VOTING. Section 1104(5) provides that approval of a plan of merger or share exchange requires approval of the shareholders at a meeting at which a quorum consisting of a majority of the votes entitled to be cast on the plan exists and, if any class or series of shares are entitled to vote as a separate group on the plan, the approval of each such separate group at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the plan by that class or series exists. If a quorum is present, then under sections 725 and 726 the plan will be approved if more votes are cast in favor of the plan than against it by the voting group or separate voting groups entitled to vote on the plan. This represents a change from the Act's previous voting rule for mergers and share exchanges, which required approval by a majority of outstanding shares.

In lieu of approval at a shareholders' meeting, approval can be given by the consent of all the shareholders entitled to vote on the merger or share exchange, under the procedures set forth in section 704.

4. ABANDONMENT OF MERGER OR SHARE EXCHANGE. Under section 1108, the board of directors may abandon a merger or share exchange before its effective date even if the plan of merger or share exchange has already been approved by the corporation's shareholders.

5. PERSONAL LIABILITY OF SHAREHOLDERS. Section 1104(8) applies only in situations where a shareholder is becoming subject to "owner liability" as defined in section 140(31), for example, where a corporation is merging into a general partnership. Where an

eligible entity whose interest holders have owner liability, such as a general partnership, is merging into a corporation, the effect of the transaction on the owner liability of the interest holders in the eligible entity will be determined by section 1107(5).

IDAHO REPORTER'S COMMENT

Several important changes were made in section 1104 (I.C. § 30-1-1103 under the old section-numbering scheme) as a result of the 2004 amendments. First, the uniform shareholder voting rule applicable to other fundamental changes makes its appearance here in subsections (5) and (6). These subsections are consistent with the long term trend of liberalizing the shareholder approval requirements for mergers and similar fundamental changes. As amended, section 1104 retains the pre-2004 quorum requirements (a majority of the votes of each voting group entitled to be cast) but reduces the actual approvement requirement from a majority of the votes entitled to be cast of each voting group to a majority of the votes of each voting group actually cast.

Section 1104(6) clarifies the rules on group voting. Any class or series of shares has a right to a separate group vote if it is to be converted pursuant to a plan of merger or included in an exchange or if the plan of merger contains a provision that would trigger group voting if contained in a proposed articles amendment.

Section 1104(7) is similar to its immediate predecessor [I.C. § 30-1-1103(7)] in dispensing with the requirement of a shareholder vote if certain conditions are met. Amended subsection (7) makes explicit the implicit condition in our pre-2004 provision that the corporation, if it is to dispense with a shareholder vote, must be the surviving corporation in a merger or acquiring corporation in a share exchange. Further, and similarly to the pre-2004 provision, subsection (7) also requires that the plan of merger or exchange make no material change in the articles or in the number of shares, or preferences, limitations, and relative rights of shares, before the effective date of the merger or share exchange. The final existing condition to dispensing with a shareholder vote — that the merger or share exchange not result in an increase than 20% of the corporation's "voting" or "participating" shares — is now tied to section 621. Section 621(6) requires shareholder approval of any issuances of shares, other than for cash, that will result in an increase of more than 20% of the voting power of the shares outstanding immediately before the issuance. And section 621(6) is applicable to the corporation issuing shares in a "triangular" merger or share exchange, even though such issuing corporation is not formally a "party" to the triangular merger or share exchange.

Subsection (4) requires that the notice to shareholders include a copy of the articles or other organizational documents of the corporation or eligible entity into which the corporation is to be merged.

Subsection (8) has a new requirement that each shareholder separately consent to becoming subject to personal liability if the merger or share exchange would have that effect. This is still another reflection of the fact that mergers into and exchanges with non-corporate entities such as general partnerships are now permitted under sections 1102 and 1103.

30-1-1105. Merger between parent and subsidiary or between subsidiaries. — (1) A domestic parent corporation that owns shares of a domestic or foreign corporation that carry at least ninety percent (90%) of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into itself or into another such subsidiary, without the approval of the board of directors or shareholders of the subsidiary unless the articles of incorporation of any of the corporations otherwise provide, and unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.

(2) If under subsection (1) of this section approval of a merger by the subsidiary's shareholders is not required, the parent corporation shall, within ten (10) days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

(3) Except as provided in subsections (1) and (2) of this section, a merger between a parent and a subsidiary shall be governed by the provisions of part 11 of this chapter applicable to mergers generally.

History.
I.C., § 30-1-1104, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 46, p. 907.

STATUTORY NOTES

Compiler's Notes.
This section was formerly compiled as § 30-1-1104.

Former § 30-1-1105 was amended and redesignated as § 30-1-1106.

ABA OFFICIAL COMMENT

Under section 1105, if a parent owns 90 percent of the voting power of each class and series of the outstanding shares of a subsidiary that have voting power, the subsidiary may be merged into the parent or another such subsidiary, or the parent may be merged into the subsidiary, without the approval of the subsidiary's shareholders or board of directors, subject to certain informational and notice requirements. Approval by the subsidiary's shareholders is not required partly because if a parent already owns 90 percent or more of the voting power of each class and series of a subsidiary's shares, approval of a merger by the subsidiary's shareholders would be a foregone conclusion, and partly to facilitate the simplification of corporate structure where only a very small fraction of stock is held by outside shareholders. Approval by the subsidiary's board of directors is not required because if the parent owns 90 percent or more of the voting power of each class and series of the subsidiary's outstanding shares, the subsidiary's directors cannot be expected to be independent of the parent, so that the approval by the subsidiary's board of directors would also be a foregone conclusion. In other respects, mergers between parents and 90 percent-owned subsidiaries are governed by the provisions of part 11.

Section 1105 dispenses with approval by the board of directors or the shareholders of a subsidiary that is merged into the parent or another subsidiary if the conditions of the section are met. Section 1105 does not in itself dispense with approval by the shareholders of the parent. Under section 1104(7), a merger of the kind described in section 1105 in which the subsidiary is merged upstream into the parent would usually not require approval of the parent's shareholders, because in such cases the parent's articles of incorporation are usually not affected by the merger and the parent usually does not issue stock carrying more than 20 percent of its voting power. If, however, a parent is merged downstream into the subsidiary, approval by the parent's shareholders would be required under section 1104.

IDAHO REPORTER'S COMMENT

There are three 2004 changes worth noting in this so-called "short-form" merger provision. First, section 1105 (which replaced I.C. § 30-1-1104) changed the ownership eligibility requirement for a short term merger to 90% of "voting power" of each class and series of the subsidiary to be merged, rather than 90% ownership of the outstanding shares of each class of such corporation.

Second, the short-term procedure was extended between two subsidiaries if the parent owns 90% of each.

Third and finally, amended section 1105 does away with the requirement in old I.C. § 30-1-1104(4) that the parent delay filing articles of merger for at least 30 days after the plan of merger was mailed to each shareholder of the subsidiary who did not waive the subsection (3) mailing requirement. Under amended section 1105(2), the parent need only notify each of the subsidiary's shareholders that the merger has become effective within 10 days of such effectiveness.

30-1-1106. Articles of merger or share exchange. — (1) After a plan of merger or share exchange has been adopted and approved as required by this chapter, articles of merger or share exchange shall be executed on behalf of each party to the merger or share exchange by any officer or other duly authorized representative. The articles shall set forth:

(a) The names of the parties to the merger or share exchange;

(b) If the articles of incorporation of the survivor of a merger are amended, or if a new corporation is created as a result of a merger, the

amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation;

(c) If the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this chapter and the articles of incorporation;

(d) If the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect; and

(e) As to each foreign corporation or eligible entity that was a party to the merger or share exchange, a statement that the participation of the foreign corporation or eligible entity was duly authorized as required by the organic law of the corporation or eligible entity.

(2) Articles of merger or share exchange shall be delivered to the secretary of state for filing by the survivor of the merger or the acquiring corporation in a share exchange, and shall take effect at the effective time provided in section 30-1-123, Idaho Code. Articles of merger or share exchange filed under this section may be combined with any filing required under the organic law of any domestic eligible entity involved in the transaction if the combined filing satisfies the requirements of both this section and the other organic law.

History.

I.C., § 30-1-1105, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 47, p. 907.

STATUTORY NOTES

Compiler's Notes.

This section was formerly compiled as § 30-1-1105.

Former § 30-1-1106 was amended and redesignated as § 30-1-1107 by S.L. 2004, ch. 324, § 48.

ABA OFFICIAL COMMENT

The filing of articles of merger or share exchange makes the transaction a matter of public record. The requirements of filing are set forth in section 120. The effective date of the articles is the effective date of their filing, unless otherwise specified. Under section 123, a document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified, except that a delayed effective date may not be later than the 90th day after the date the document is filed.

If a merger or share exchange involves a domestic eligible entity whose organic law also requires a filing to effectuate the transaction, section 1106(2) permits the filings under that organic law and this section to be combined so that only one document need be filed with the secretary of state.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, the predecessor to section 1106, section 1105, closely followed old I.C. § 30-1-74 with only the following minor changes:

(1) Section 1105(1)(c) changed the vote reporting requirements.

(2) The voting group concept we've seen before was applied again here.

(3) Subsection (2) added an effective date provision in order to make precise references elsewhere in the Model Act to the effective date of a merger or share exchange.

(4) Filing requirements were omitted since they are codified together in part 1. As usual there were also stylistic changes.

Not much of significance happened here in the 2004 revision. The amendments in section 1106 (prior I.C. § 30-1-1105) simplified the shareholder vote reporting requirements to conform with the simplified reporting requirements in amended section 1006 for amendments to the articles, above. Any other 2004 changes in section 1106 were stylistic and/or conforming to other sections.

30-1-1107. Effect of merger or share exchange. — (1) When a merger becomes effective:

(a) The corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be;

(b) The separate existence of every corporation or eligible entity that is merged into the survivor ceases;

(c) All property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment;

(d) All liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor;

(e) The name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger;

(f) The articles of incorporation or organic documents of the survivor are amended to the extent provided in the plan of merger;

(g) The articles of incorporation or organic documents of a survivor that is created by the merger become effective; and

(h) The shares of each corporation that is a party to the merger, and the interests in an eligible entity that is a party to a merger, that are to be converted under the plan of merger into shares, eligible interests, obligations, rights to acquire securities, other securities, cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares or eligible interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under part 13 of this chapter or the organic law of the eligible entity.

(2) When a share exchange becomes effective, the shares of each domestic corporation that are to be exchanged for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under part 13 of this chapter.

(3) A person who becomes subject to owner liability for some or all of the debts, obligations or liabilities of any entity as a result of a merger or share exchange shall have owner liability only to the extent provided in the organic law of the entity and only for those debts, obligations and liabilities that arise after the effective time of the articles of merger or share exchange.

(4) Upon merger becoming effective, a foreign corporation, or a foreign eligible entity, that is the survivor of the merger is deemed to:

(a) Agree that service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is party to the merger who

exercise appraisal rights may be made in the manner provided in section 30-413, Idaho Code; and

(b) Agree that it will promptly pay the amount, if any, to which such shareholders are entitled under part 13 of this chapter.

(5) The effect of a merger or share exchange on the owner liability of a person who had owner liability for some or all of the debts, obligations or liabilities of a party to the merger or share exchange shall be as follows:

(a) The merger or share exchange does not discharge any owner liability under the organic law of the entity in which the person was a shareholder or interest holder to the extent any such owner liability arose before the effective time of the articles of merger or share exchange.

(b) The person shall not have owner liability under the organic law of the entity in which the person was a shareholder or interest holder prior to the merger or share exchange for any debt, obligation or liability that arises after the effective time of the articles of merger or share exchange.

(c) The provisions of the organic law of any entity for which the person had owner liability before the merger or share exchange shall continue to apply to the collection or discharge of any owner liability preserved by paragraph (a) of this subsection, as if the merger or share exchange had not occurred.

(d) The person shall have whatever rights of contribution from other persons as are provided by the organic law of the entity for which the person had owner liability with respect to any owner liability preserved by paragraph (a) of this subsection, as if the merger or share exchange had not occurred.

History.

I.C., § 30-1-1106, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 48, p. 907; am. 2007, ch. 314, § 12, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-1-1107, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 49.

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (4)(a), which formerly read: "Appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is party to the merger who exercise appraisal rights."

Compiler's Notes.

This section was formerly compiled as § 30-1-1106.

ABA OFFICIAL COMMENT

Under section 1107(1), in the case of a merger the survivor and the parties that merge into the survivor become one. The survivor automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of each party that is merged into it. A merger is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. It does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under section 1107(1)(e), the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result

of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect, because whether or not the survivor's name is substituted it succeeds to the claims of, and is subject to the liabilities of, any party to the merger whose separate existence ceased as a result of the merger.

In contrast to a merger, a share exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring corporation the assets of the corporation whose stock is to be acquired, or render the acquiring corporation liable for the liabilities of the corporation whose stock the acquiring corporation acquires.

Under section 1107(1)(h), on the effective date of a merger the former shareholders of a corporation that is merged into the survivor are entitled only to the rights provided in the plan of merger (which would include any rights they have as holders of the consideration they acquire) or to any rights they may have under part 13. Similarly, under section 1107(2), on the effective date of a share exchange the former shareholders of a corporation whose shares are acquired are entitled only to the rights provided in the plan of share exchange (which would include any rights they have as holders of the consideration they acquire) or to any rights they may have under part 13. These provisions are not intended to preclude an otherwise proper question concerning the merger's validity, or to override or otherwise affect any provisions of part 13 concerning the exclusiveness of rights under that part.

Under section 1107(4), when a merger becomes effective a foreign corporation, or a foreign eligible entity, that is the survivor of the merger is deemed to appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of any shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights, and to agree that it will promptly pay the amount, if any, to which such shareholders are entitled under part 13. This result is based on the implied consent of such a foreign corporation, or foreign eligible entity, to the terms of part 11 by virtue of entering into an agreement that is governed by this part.

Section 1107(5) preserves liability only for owner liabilities to the extent they arise before the merger or share exchange. Owner liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary.

Under section 1104(8), a merger cannot have the effect of making any shareholder of a domestic corporation subject to owner liability for the debts, obligations or liabilities of any other person or entity unless each such shareholder has executed a separate written consent to become subject to such owner liability.

This section does not address the issue that could arise in a merger where a person who had authority to bind a party to the merger loses that authority because of the merger and yet purports to act to bind the survivor of the merger. For example, in a merger of a general partnership into a corporation, a person who is a general partner but does not become an officer of the corporation will lose the authority of a general partner to bind the business to obligations incurred in the ordinary course, but might purport to commit the corporation to such an obligation in dealing with a person who does not have knowledge of the merger. Instances in which this occurs are rare and, in the limited instances in which it does occur, general principles of agency law are sufficient to resolve the problems created.

IDAHO REPORTER'S COMMENT

Model Act § 1106(1), like its predecessor old I.C. § 30-1-76, described the effect of a merger and in doing so restated general principles.

Subsection (1) was based on the second paragraph of old § 76, including subparagraphs (a)-(f), with numerous changes in language and style.

Subsection (1)(f) was added to make express that upon the effective date of a merger, the conversion of shares contemplated by the merger occurs automatically.

Subsection (2) simplified and broke out into a separate subsection language dealing with the effect of share exchanges. No substantive change was intended by treating separately what was treated together with mergers in old § 76.

The matters in the first paragraph of old § 76, concerning the effective date, are now dealt with in § 1106 and part 1.

References to "consolidation" and "entities" (LLCs) appeared in old § 76 but not in ABA Official Text § 1106. We added the references to LLCs to the Official Text in section 1106 (1).

Many of the 2004 changes here were simply a continuation of the long effort to simplify the language describing the legal consequences of mergers and share exchanges. Beyond this, two changes seem worthy of note. New section 1107 reflects the amendments to section 1102 authorizing mergers between corporations and eligible entities. And a separate provision

dealing with mergers with foreign corporations has been deleted (prior I.C. § 30-1-1107), its substance now being consolidated in appropriate sections of amended part 11.

30-1-1108. Abandonment of a merger or share exchange. — (1) Unless otherwise provided in a plan of merger or share exchange or in the laws under which a foreign business corporation or a domestic or foreign eligible entity that is a party to a merger or a share exchange is organized or by which it is governed, after the plan has been adopted and approved as required by this part, and at any time before the merger or share exchange has become effective, it may be abandoned by a domestic business corporation that is a party thereto without action by its shareholders in accordance with any procedures set forth in the plan of merger or share exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors, subject to any contractual rights of other parties to the merger or share exchange.

(2) If a merger or share exchange is abandoned under subsection (1) of this section after articles of merger or share exchange have been filed with the secretary of state but before the merger or share exchange has become effective, a statement that the merger or share exchange has been abandoned in accordance with this section, executed on behalf of a party to the merger or share exchange by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the merger or share exchange. Upon filing, the statement shall take effect and the merger or share exchange shall be deemed abandoned and shall not become effective.

History.

I.C., § 30-1-1108, as added by 2004, ch. 324, § 50, p. 907.

ABA OFFICIAL COMMENT

Under section 1108, unless otherwise provided in the plan of merger or share exchange, a domestic business corporation that is a party to a merger or share exchange may abandon the transaction without shareholder approval, even though the transaction has been previously approved by the shareholders. The power under section 1108 to abandon a transaction without shareholder approval does not affect any contract rights that other parties may have. The power of a foreign business corporation or a domestic or foreign eligible entity to abandon a transaction will be determined by the organic law of the corporation or eligible entity, except as provided in sections 1102(2)(a) and 1103(2)(a).

IDAHO REPORTER'S COMMENT

This has been added as a separate section and is similar to prior I.C. § 30-1-1103(9). Subsection (2) is new and authorizes abandonment of a plan filed but not yet effective.

Part 12. Disposition of Assets

30-1-1201. Disposition of assets not requiring shareholder approval. — No approval of the shareholders of a corporation is required, unless the articles of incorporation otherwise provide:

(1) To sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business;

(2) To mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of the corporation's assets, whether or not in the usual and regular course of business; or

(3) To transfer any or all of the corporation's assets to one (1) or more corporations or eligible entities all the shares or interests of which are owned by the corporation; or

(4) To distribute assets pro rata to the holders of one (1) or more classes or series of the corporation's shares.

History.
I.C., § 30-1-1201, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 52, p. 907.

ABA OFFICIAL COMMENT

Section 1201 provides that no approval of the shareholders is required for dispositions of assets of the types described therein, unless the articles of incorporation otherwise provide. Dispositions other than those described in section 1201 require shareholder approval if they fall within section 1202.

Under subsection (1), shareholder approval is not required for a disposition of the corporation's assets in the usual and regular course of business, regardless of the size of the transaction. Examples of such dispositions would include the sale of a building that was the corporation's only major asset where the corporation was formed for the purpose of constructing and selling that building, or the sale by a corporation of its only major business where the corporation was formed to buy and sell businesses and the proceeds of the sale are to be reinvested in the purchase of a new business, or an open- or closed-end investment company whose portfolio turns over many times in short periods.

Subsection (3) provides that no approval of shareholders is required to transfer any or all of the corporation's assets to a wholly owned subsidiary or other entity. This provision may not be used as a device to avoid a vote of shareholders by a multi-step transaction.

Subsection (4) provides that no approval of the shareholders is required to distribute assets pro rata to the holders of one or more classes of the corporation's shares. A traditional spin-off — that is, a pro rata distribution of the shares of a subsidiary to the holders of one or more classes of shares — falls within this subsection. A split-off — that is, a non pro rata distribution of shares of a subsidiary to some or all shareholders in exchange for some of their shares — would require shareholder approval if the disposition left the parent without a significant continuing business activity under subsection 1202(1). A split-up — that is, a distribution of the shares of two or more subsidiaries in complete liquidation to shareholders — would be governed by section 1402 (dissolution), not by part 12. In each of the foregoing situations, the subsidiary or subsidiaries could be historical or newly created.

IDAHO REPORTER'S COMMENT

When the Model Act was first adopted in Idaho in 1997, the only substantive difference between prior I.C. § 30-1-78 and Model Act § 1201 was the latter's addition in pre-2004 subsection (1)(c) [corresponding to amended subsection (3)] of transfers to wholly-owned subsidiaries to the list of transactions that the board may accomplish without shareholder approval. Any other differences seemed almost purely stylistic.

The 2004 amendments here started out with new terminology, replacing existing "sale" of assets with "disposition" in order to indicate the full variety of transactions that do not require shareholder approval (unless required in the company's articles) under section 1201.

In addition to the traditional exemptions from the shareholder approval requirement for dispositions "in the usual and regular course of business" and for mortgages and the like, new subsection (4) clarified that shareholder approval is not needed for pro-rata distributions to shareholders.

Finally, subsection (3) was amended to include dispositions to "other entities" wholly owned by the company in recognition that (under further amendments to different sections) subsidiaries will be able to include non-corporate business entities.

30-1-1202. Shareholder approval of certain dispositions. — (1) A

sale, lease, exchange or other disposition of assets, other than a disposition described in section 30-1-1201, Idaho Code, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least twenty-five percent (25%) of total assets at the end of the most recently completed fiscal year, and twenty-five percent (25%) of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.

(2) A disposition that requires approval of the shareholders under subsection (1) of this section shall be initiated by a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors shall transmit to the shareholders the basis for that determination.

(3) The board of directors may condition its submission of a disposition to the shareholders under subsection (1) of this section on any basis.

(4) If a disposition is required to be approved by the shareholders under subsection (1) of this section, and if the approval is to be given at a meeting, the corporation shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice shall state that the purpose, or one (1) of the purposes, of the meeting is to consider the disposition and shall contain a description of the disposition, including the terms and conditions thereof and the consideration to be received by the corporation.

(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a greater number of votes to be present, the approval of a disposition by the shareholders shall require the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the disposition exists.

(6) After a disposition has been approved by the shareholders under subsection (2) of this section, and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.

(7) A disposition of assets in the course of dissolution under part 14 of this chapter is not governed by this section.

(8) The assets of a direct or indirect consolidated subsidiary shall be deemed the assets of the parent corporation for the purposes of this section.

History.

I.C., § 30-1-1202, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 53, p. 907.

ABA OFFICIAL COMMENT

Section 1202(1) requires shareholder approval for a sale, lease, exchange or other disposition by a corporation that would leave the corporation without a significant continuing business activity. The test employed in section 1202(1) for whether a disposition of assets requires shareholder approval differs verbally from the test employed in past versions of the Model Act, which centered on whether a sale involves "all or substantially all" of a corporation's assets. The "all or substantially all" test has also been used in most corporate statutes. In practice, however, courts interpreting these statutes have commonly employed a test comparable to that embodied in 1202(1). For example, in *Gimbel v. Signal Cos.,* 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974), the court stated that "While it is true that [the all or substantially all] test does not lend itself to a strict mathematical standard to be applied in every case, the qualitative factor can be defined to some degree.... If the sale is of assets quantitatively vital to the operation of the corporation and is out of the ordinary [course] and substantially affects the existence and purpose of the corporation then it is beyond the power of the Board of Directors." In *Thorpe v. CERBCO, Inc.,* 676 A.2d 436 (Del. 1996), a major issue was whether the sale by a corporation, CERBCO, of one of its subsidiaries, East, would have been a sale of all or substantially all of the corporation's assets, and therefore would have required shareholder approval under the Delaware statute. The court, quoting *Oberly v. Kirby,* 592 A.2d 445 (Del. 1991), stated:

> "[T]he rule announced in *Gimbel v. Signal Cos.,* Del. Ch., 316 A.2d 599, *aff'd,* Del. Supr., 316 A.2d 619 (1974), makes it clear that the need for shareholder ... approval is to be measured not by the size of a sale alone, but also by its qualitative effect upon the corporation. Thus, it is relevant to ask whether a transaction 'is out of the ordinary and substantially affects the existence and purpose of the corporation.' [*Gimbel,* 316 A.2d] at 606."
>
> In the opinion below, the Chancellor determined that the sale of East would constitute a radical transformation of CERBCO. In addition, CERBCO's East stock accounted for 68 [percent] of CERBCO's assets in 1990 and this stock was its primary income generating asset. We therefore affirm the decision that East stock constituted "substantially all" of CERBCO's assets as consistent with Delaware law.

See also *Katz v. Bregman,* 431 A.2d 1274 (Del. Ch.), appeal refused sub nom. *Plant Industries, Inc. v. Katz,* 435 A.2d 1044 (Del. 1981); *Stiles v. Aluminum Products Co.,* 338 Ill. App. 48, 86 N.E.2d 887 (1949); *Campbell v. Vose,* 515 F.2d 256 (10th Cir. 1975); *South End Improvement Group, Inc. v. Mulliken,* 602 So. 2d 1327 (Fla. App. 1992); *Schwadel v. Uchitel,* 455 So. 2d 401 (Fla. App. 1984).

Whether a disposition leaves a corporation with a significant continuing business activity, within the meaning of section 1202(1), depends primarily on whether the corporation will have a remaining business activity that is significant when compared to the corporation's business prior to the disposition. The addition of a safe harbor, embodied in the second sentence of section 1202(1), under which a significant business activity exists if the continuing business activity represented at least 25 percent of the total assets and 25 percent of either income from continuing operations before income taxes or revenues from continuing operations, in each case of the company and its subsidiaries on a consolidated basis for the most recent full fiscal year, the corporation will conclusively be deemed to have retained a significant continuing business activity, represents a policy judgment that a greater measure of certainty than is provided by interpretations of the current case law is highly desirable. The application of this bright-line safe-harbor test should, in most cases, produce a reasonably clear result substantially in conformity with the approaches taken in the better case law developing the "quantitative" and "qualitative" analyses. The test is to be applied to assets, revenue, and income for the most recent fiscal year ended immediately before the decision by the board of directors to make the disposition in question.

If a corporation disposes of assets for the purpose of reinvesting the proceeds of the disposition in substantially the same business in a somewhat different form (for example, by selling the corporation's only plant for the purpose of buying or building a replacement plant), the disposition and reinvestment should be treated together, so that the transaction should not be deemed to leave the corporation without a significant continuing business activity.

In determining whether a disposition would leave a corporation without a significant continuing business activity, the term "the corporation" includes subsidiaries that are or should be consolidated with the parent under generally accepted accounting principles. Accordingly, if,

for example, a corporation's only significant business is owned by a wholly or almost wholly owned subsidiary, a sale of that business requires approval of the parent's shareholders under section 1202. See *Schwadel v. Uchitel,* 455 So. 2d 401 (Fla. App. 1984). Correspondingly, if a corporation owns one significant business directly, and several other significant businesses through one or more wholly or almost wholly owned subsidiaries, a sale by the corporation of the single business it owns directly does not require shareholder approval under section 1202.

If all or a large part of a corporation's assets are held for investment, the corporation actively manages those assets, and it has no other significant business, for purposes of the statute the corporation should be considered to be in the business of investing in such assets, so that a sale of most of those assets without a reinvestment should be considered a sale that would leave the corporation without a significant continuing business activity. In applying the 25 percent tests of section 1202(1), an issue could arise if a corporation had more than one business activity, one or more of which might be traditional operating activities such as manufacturing or distribution, and another of which might be considered managing investments in other securities or enterprises. If the activity constituting the management of investments is to be a continuing business activity as a result of the active engagement of the management of the corporation in that process, and the 25 percent tests were met upon the disposition of the other businesses, shareholder approval would not be required.

As under section 640(4) (determination of whether a dividend is permissible), and for the same reasons, the board of directors may base a determination that a retained continuing business falls within the 25 percent bright-line tests of the safe harbor embodied in the second sentence of section 1202(1) either on accounting principles and practices that are reasonable in the circumstances or (in applying the asset test) on a fair valuation or other method that is reasonable in the circumstances. See section 640(4) and Comment 4 thereto.

The utilization of the term "significant," and the specific 25 percent safe harbor test for purposes of this section, should not be read as implying a standard for the test of significance or materiality for any other purposes under the Act or otherwise.

2. SUBMISSION TO SHAREHOLDERS. Section 1202(2) requires the board of directors, after having adopted a resolution authorizing a disposition that requires shareholder approval, to submit the disposition to the shareholders for approval. When submitting the disposition to the shareholders, the board of directors must make a recommendation to the shareholders that the disposition be approved, unless the board makes a determination that because of conflicts of interests or other special circumstances it should make no recommendation. For ex-ample, the board of directors may make such a determination where there is not a sufficient number of directors free of a conflicting interest to approve the transaction or because the board of directors is evenly divided as to the merits of a transaction but is able to agree that shareholders should be permitted to consider the transaction. If the board of directors makes such a determination, it must describe the conflicts of interests or special circumstances, and communicate the basis for the determination, when submitting the disposition to the shareholders. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, shareholders should not be asked to act on a disposition in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of shareholders.

Section 1202(3) permits the board of directors to condition its submission of a proposed disposition to the shareholders. Among the conditions that board might impose are that the disposition will not be deemed approved: (i) unless it is approved by a specified percentage of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders, or (ii) if shareholders holding more than a specified fraction of the outstanding shares assert appraisal rights. The board of directors is not limited to conditions of these types.

3. QUORUM AND VOTING. Section 1202(5) provides that approval of a plan of merger or share exchange requires approval of the shareholders at a meeting at which at least a majority of the votes entitled to be cast on the plan is present, including, if any class or series of shares are entitled to vote as a separate group on the plan, the approval of each such separate group at a meeting at which a similar quorum of the voting group exists. If a quorum is present, then under sections 725 and 726 the plan will be approved if more votes are cast in favor of the plan than against it by the voting group or separate voting groups entitled to vote on the plan. This represents a change from the Act's previous voting rule, which required approval by a majority of outstanding shares.

In lieu of approval at a shareholders' meeting, approval can be given by the consent of all the shareholders entitled to vote on the merger or share exchange, under the procedures set forth in section 704.

4. APPRAISAL RIGHTS. Shareholders of a domestic corporation that engages in a disposition that requires shareholder approval under section 1202 may have appraisal rights. See part 13.

5. SUBSIDIARIES. The term "subsidiary" or "subsidiaries," as used in section 1202, includes both corporate and noncorporate subsidiaries. Accordingly, for example, a limited liability company or a partnership may be a subsidiary for purposes of section 1202.

IDAHO REPORTER'S COMMENT

When the Model Act was adopted in Idaho in 1997, the most substantive difference here was prior I.C. § 30-1-79(e)'s exception from the shareholder approval requirement for transactions "if the corporation is insolvent." This was a carryover from pre-1979 Idaho law. The idea seems to have been that when a corporation is unable to meet its obligations and its assets are being sold to satisfy corporate debts, it shouldn't be necessary to require the formality of a shareholder vote. This idea was not accepted by the 1997 revisers, and section 1202 therefore does not continue this exception.

Sections 1202(1), (4), (5) and (6) followed § 79 with only stylistic changes and changes made to reflect the development of the voting groups concept.

Sections 1202(2) and (3) were new in 1997 but parallel to similar provisions we've seen before when shareholder action on specific proposals is required. See § 1003, e.g.

Section 1202(7) was also new in 1997.

In 2004 there were significant substantive changes made to section 1202. As amended, section 1202 is a new approach to defining those asset dispositions (no longer just "sales") that represent such a fundamental change in the corporation's business as to require shareholder approval.

The changes begin in subsection (1) with a new basic test for triggering the shareholder vote requirement. Instead of the traditional "all, or substantially all, of its property" test, the new shareholder vote triggering test is whether the disposition "would leave the corporation without a significant continuing business activity." This new language more accurately describes the way many courts have been applying the pre-existing "all or substantially all" test.

Amended subsection (1) also adds a brand new qualitative (25% retained) "safe-harbor" provision, raising a conclusive presumption as to retention of "significant continuing business activity."

Amended subsection (5) continues the long-term trend of reducing the shareholder vote required to approve asset dispositions and applies the new uniform voting requirement rule for approval of all other fundamental changes: the proposal must be approved at a meeting at which a majority of the votes entitled to be cast are present, rather than by a majority of the votes entitled to be cast.

Subsections (7) and (8) are new. Subsection (7) simply recites that disposition of assets in dissolution/liquidation no longer triggers appraisal rights under amended section 1302(1). And new subsection 1202(8) clarifies that the 25% safe-harbor test in section 1202(1) shall be applied to include consolidated subsidiaries, whether directly or indirectly owned by the parent.

Part 13. Appraisal Rights

30-1-1301. Definitions. — In this part:

(1) "Affiliate" means a person that directly or indirectly through one (1) or more intermediaries controls, is controlled by, or is under common control with another person or is a senior executive thereof. For purposes of section 30-1-1302(2)(d), Idaho Code, a person is deemed to be an affiliate of its senior executives.

(2) "Beneficial shareholder" means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's behalf.

(3) "Corporation" means the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in sections 30-1-1322 through 30-1-1331, Idaho Code, includes the surviving entity in a merger.

(4) "Fair value" means the value of the corporation's shares determined:
(a) Immediately before the effectuation of the corporate action to which the shareholder objects;
(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
(c) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 30-1-1302(1)(e), Idaho Code.

(5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.

(6) "Preferred shares" means a class or series of shares whose holders have preference over any other class or series with respect to distributions.

(7) "Record shareholder" means the person in whose name shares are registered in the records of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with the corporation.

(8) "Senior executive" means the chief executive officer, chief operating officer, chief financial officer, and anyone in charge of a principal business unit or function.

(9) "Shareholder" means both a record shareholder and a beneficial shareholder.

History.
I.C., § 30-1-1301, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 55, p. 907.

STATUTORY NOTES

Cross References.
Interest on judgments, § 28-22-104.

JUDICIAL DECISIONS

Cited in: Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

ABA OFFICIAL COMMENT

1. OVERVIEW. Part 13 deals with the tension between the desire of the corporate leadership to be able to enter new fields, acquire new enterprises, and rearrange investor rights, and the desire of investors to adhere to the rights and the risks on the basis of which they invested. Contemporary corporation statutes in the United States attempt to resolve this tension through a combination of two devices. On the one hand, through their approval of an amendment to the articles of incorporation, a merger, share exchange or disposition of assets, the majority may change the nature and shape of the enterprise and the rights of all its shareholders. On the other hand, shareholders who object to these changes may withdraw the fair value of their investment in cash through their exercise of appraisal rights.

The traditional accommodation has been sharply criticized from two directions. From the viewpoint of investors who object to the transaction, the appraisal process is criticized for providing little help to the ordinary investor because its technicalities make its use difficult, expensive, and risky. From the viewpoint of the corporate leadership, the appraisal process is criticized because it fails to protect the corporation from demands that are motivated by the hope of a nuisance settlement or by fanciful conceptions of value. See generally Bayless

Manning, "*The Shareholders' Appraisal Remedy: An Essay for Frank Coker,*" 72 Yale L.J. 223 (1962).

Part 13 is a compromise between these opposing points of view. It is designed to increase the frequency with which assertion of appraisal rights leads to economical and satisfying solutions, and to decrease the frequency with which such assertion leads to delay, expense, and dissatisfaction. It seeks to achieve these goals primarily by simplifying and clarifying the appraisal process, as well as by motivating the parties to settle their differences in private negotiations without resort to judicial appraisal proceedings:

Part 13 proceeds from the premise that judicial appraisal should be provided by statute only when two conditions co-exist. First, the proposed corporate action as approved by the majority will result in a fundamental change in the shares to be affected by the action. Second, uncertainty concerning the fair value of the affected shares may cause reasonable persons to differ about the fairness of the terms of the corporate action. Uncertainty is greatly reduced, however, in the case of publicly-traded shares. This explains both the market exception described below and the limits provided to the exception.

Appraisal rights in connection with mergers and share exchanges under part 11 and dispositions of assets requiring shareholder approval under part 12 are provided when these two conditions co-exist. Each of these actions will result in a fundamental change in the shares that a disapproving shareholder may feel was not adequately compensated by the terms approved by the majority. Except for shareholders of a subsidiary corporation that is merged under section 1105 (the "short-form" merger), only those shareholders who are entitled to vote on a transaction are entitled to appraisal rights. The linkage between voting and appraisal rights is justified because the right to a shareholder vote is a good proxy for assessing the seriousness of the change contemplated by the corporate action. This is especially true where the action triggers group-voting provisions.

Notwithstanding this linkage, amended part 13 eliminates appraisal for voting shareholders in several instances where it would have been available under the 1984 Act. Shareholders who are entitled to vote on a corporate action, whether because such shareholders have general voting rights or because group voting provisions are triggered, are not entitled to appraisal if the change will not alter the terms of the class or series of securities that they hold. Thus, statutory appraisal rights are not available for shares of any class of the surviving corporation in a merger or any class of shares that is not included in a share exchange. Appraisal is also not triggered by a voluntary dissolution under part 14 because that action does not affect liquidation rights — the only rights that are relevant following a shareholder vote to dissolve.

With the exception of reverse stock splits that result in cashing out some of the shares of a class or series, amended part 13 also eliminates appraisal in connection with all amendments to the articles of incorporation. This change in amended part 13 does not reflect a judgment that an amendment changing the terms of a particular class or series may not have significant economic effects. Rather, it reflects a judgment that distinguishing among different types of amendments for the purposes of statutory appraisal is necessarily arbitrary and thus may not accurately reflect the actual demand of shareholders for appraisal in specific instances. Instead, amended part 13 permits a high degree of private-ordering by delineating a list of transactions for which the corporation may voluntarily choose to provide appraisal and by permitting a provision in the articles of incorporation that eliminates, in whole or in part, statutory appraisal rights for preferred shares.

Part 13 also is unique in its approach to appraisal rights for publicly-traded shares. Approximately half of the general corporation statutes in the United States provide exceptions to appraisal for publicly-traded shares, on the theory that it is not productive to expose the corporation to the time, expense and cash drain imposed by appraisal demands when shareholders who are dissatisfied with the consideration offered in an appraisal-triggering transaction could sell their shares and obtain cash from the market. This exception to appraisal is generally known as the "market-out" and is referred to here as the "market exception." Opponents of the market exception argue that it results in unfairness where neither the consideration offered in connection with the transaction nor the market price reflects the fair value of the shares, particularly if the corporate decision-makers have a conflict of interest.

Part 13 seeks to accommodate both views by providing a market exception that is limited to those situations where shareholders are likely to receive fair value when they sell their shares in the market after the announcement of an appraisal-triggering transaction. For the market exception to apply under part 13, there must first be a liquid market. Second, unique to part 13, the market exception does not apply in specified circumstances where the appraisal-triggering action is deemed to be a conflict of-interest transaction.

2. DEFINITIONS. Section 1301 contains specialized definitions applicable only to part 13.

Beneficial shareholder. The definition of "beneficial shareholder" means a person who owns the beneficial interest in shares; 'shares' is defined broadly enough in section 140(40) to

include, without limitation, a holder of a depository receipt for shares. Similar definitions are found in section 740(2) (derivative proceedings) and section 1602(6) (inspection of records by a shareholder). In the context of part 13, beneficial shareholder means a person having a direct economic interest in the shares. The definition is not intended to adopt the broad definition of beneficial ownership in SEC Rule 13d-2, which includes persons with a right to vote or dispose of the shares even though they have no economic interest in them. However, section 1302(2)(e) includes the concept of the right to vote in determining whether the event represents a conflict transaction that renders the market exception unavailable.

Corporation. The definition of "corporation" in section 1301(3) includes, for purposes of the post-transaction matters covered in section 1322 through 1331, a successor entity in a merger where the corporation is not the surviving entity. The definition does not include a domestic acquiring corporation in a share exchange or disposition of assets because the corporation whose shares or assets were acquired continues in existence in both of these instances and remains responsible for the appraisal obligations. Whether a foreign corporation or other form of domestic or foreign entity is subject to appraisal rights in connection with any of these transactions depends upon the corporation or other applicable law of the relevant jurisdiction.

Fair value. Subsection (a) of the definition of "fair value" in section 1301(4) makes clear that fair value is to be determined immediately before the effectuation of the corporate action, rather than, as is the case under most state statutes that address the issue, the date of the shareholders' vote. This comports with the purpose of this part to preserve the shareholder's prior rights as a shareholder until the effective date of the corporate action, rather than leaving the shareholder in an ambiguous state with neither rights as a shareholder nor perfected appraisal rights. The corporation and, as relevant, its shares are valued as they exist immediately before the effectuation of the corporate action·requiring appraisal. Accordingly, section 1301(4) permits consideration of changes in the market price of the corporation's shares in anticipation of the transaction, to the extent such changes are relevant. Similarly, in a two-step transaction culminating in a merger, the corporation is valued immediately before the second step merger, taking into account any interim changes in value. Cf. *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289 (Del. 1996).

The definition of "fair value" in section 1301(4) makes several changes from the prior version. The 1984 Model Act's definition of "fair value" was silent on how fair value was to be determined, except for a concluding clause that excluded from the valuation "any appreciation or depreciation in anticipation of the corporate action, unless exclusion would be inequitable." The Official Comment provided that the section left to the courts "the details by which 'fair value' is to be determined within the broad outlines of the definition." While the logic of the prior Official Comment continues to apply, the exclusionary clause in the prior Model Act definition, including the qualification for cases where the exclusion would be inequitable, has been deleted. Those provisions have not been susceptible to meaningful judicial interpretation and have been set aside in favor of the broader concept in subsection (b).

The new formulation in paragraph (b), which is patterned on section 7.22 of the Principles of Corporate Governance promulgated by the American Law Institute, directs courts to keep the methodology chosen in appraisal proceedings consistent with evolving economic concepts and adopts that part of section 7.22 which provides that fair value should be determined using "customary valuation concepts and techniques generally employed ... for similar businesses in the context of the transaction requiring appraisal." Subsection (b) adopts the accepted view that different transactions and different contexts may warrant different valuation methodologies. Customary valuation concepts and techniques will typically take into account numerous relevant factors, including assigning a higher valuation to corporate assets that would be more productive if acquired in a comparable trans-action but excluding any element of value attributable to the unique synergies of the actual purchaser of the corporation or its assets. For example, if the corporation's assets include undeveloped real estate that is located in a prime commercial area, the court should consider the value that would be attributed to the real estate as commercial development property in a comparable transaction. The court should not, however, assign any additional value based upon the specific plans or special use of the actual purchaser.

Modern valuation methods will normally result in a range of values, not a particular single value. When a transaction falls within that range, "fair value" has been established. Absent unusual circumstances, it is expected that the consideration in an arm's-length transaction will fall within the range of "fair value" for purposes of section 1301(4). Section 7.22 of the ALI Principles of Corporate Governance also provides that in situations that do not involve certain types of specified conflicts of interest, "the aggregate price accepted by the board of directors of the subject corporation should be presumed to represent the fair value of the corporation, or of the assets sold in the case of an asset sale, unless the plaintiff can prove otherwise by clear and convincing evidence." That presumption has not been included in the definition of "fair value"

in section 1301(4) because the framework of defined types of conflict transactions which is a predicate for the ALI's presumption is not contained in the Model Act. Nonetheless, under section 1301(4), a court determining fair value should give great deference to the aggregate consideration accepted or approved by a disinterested board of directors for an appraisal-triggering transaction.

Subsection (c) of the definition of "fair value" establishes that valuation discounts for lack of marketability or minority status are inappropriate in most appraisal actions, both because most transactions that trigger appraisal rights affect the corporation as a whole and because such discounts give the majority the opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction. Subsection (c), in conjunction with the lead-in language to the definition, is also designed to adopt the more modern view that appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone. If, however, the corporation voluntarily grants appraisal rights for transactions that do not affect the entire corporation — such as certain amendments to the articles of incorporation-the court should use its discretion in applying discounts if appropriate. As the introductory clause of section 1301 notes, the definition of "fair value" applies only to part 13. See the Official Comment to section 1434 which recognizes that a minority discount may be appropriate under that section.

Interest. The definition of "interest" in section 1301(5) is included to apprise the parties of their respective rights and obligations. The right to receive interest is based on the elementary consideration that the corporation, rather than the shareholder demanding appraisal, has the use of the shareholder's money from the effective date of the corporate action (when those shareholders who do not demand appraisal rights have the right to receive their consideration from the transaction) until the date of payment. Section 1301(5) thus requires interest to be paid at the rate of interest on judgments from the effective date of the corporate action until the date of payment. The specification of the rate of interest on judgments, rather than a more subjective rate, eliminates a possible issue of contention and should facilitate voluntary settlements. Each state determines whether interest is compound or simple.

Senior executive. The definition of "senior executive" in section 1301(8) encompasses the group of individuals in control of corporate information and the day-to-day operations. An employee of a subsidiary organization is a "senior executive" of the parent if the employee is "in charge of a principal business unit or function" of the parent and its subsidiaries on a combined or consolidated basis.

Shareholder. The definition of "shareholder" in section 1301(9) for purposes of part 13 differs from the definition of that term used elsewhere in the Model Act. Section 140(39) defines "shareholder" as used generally in the Act to mean only a "record shareholder"; that term is specifically defined in section 1301(7). Section 1301(9), on the other hand, defines "shareholder" to include not only a "record shareholder" but also a "beneficial shareholder," a term that is itself defined in section 1301(2). The specially defined terms "record shareholder" and "beneficial shareholder" appear primarily in section 1303, which establishes the manner in which beneficial shareholders, and record shareholders who are acting on behalf of beneficial shareholders, perfect appraisal rights. The word "shareholder" is used generally throughout part 13 in order to permit both record and beneficial shareholders to take advantage of the provisions of this chapter, subject to their fulfilling the applicable requirements of this part.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act part 13 completely reorganized the provisions of the prior Model Act previously contained in old I.C. § 30-1-80 and 81. The substance of this part 13 was based almost entirely on the prior provisions, but what appeared in two sections was reorganized into the many sections of part 13.

Specifically with respect to definitions, some of Model Act § 1301's definitions were from old I.C. § 30-1-81(a) with only stylistic changes and some were new. The then new definitions were added to clarify the intent of the part and also to integrate the definitions with those of part 1 and with the provisions in section 1303.

The 2004 amended section 1301 definitions deleted one term from the pre-existing list ("dissenter"), added three new defined terms ("affiliate," "preferred shares" and "senior executive") and modified each of the six terms carried over from the pre-existing list of defined terms ("beneficial shareholder," "corporation," "fair value," "interest," "record shareholder" and "shareholder").

The new definition of "fair value" seems worthy of special attention. The timing of the valuation remains the same as under pre-existing I.C. § 30-1-1301(3), namely "immediately

before the effectuation of the corporate action to which the [shareholder] objects." New section 1301 (4)(a). But the clause generally ‘excluding any appreciation or depreciation in anticipation of the corporate action‘ was deleted and replaced by a new formulation in subsections 1301 (4)(b) and (c). Subsection (b) directs courts to use "valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal." And the 2004 Official ABA Comment adds specific advice to courts called upon to apply the new formula.

Subsection (c) of the new definition of "fair value" makes it clear that "blockage" discounts for non-marketability or for minority status are generally inappropriate in this appraisal context. Compare, e.g., the estate tax valuation context.

The definition of "interest" was amended to change the actual interest rate from the existing "average rate currently paid by the corporation on its principal bank loans" to the new "rate of interest on judgments."

Finally, on this amended section 1301 and amended part 13 in general, it should be noted that the ABA Committee's Official Comment was amended in 2004 to include an "Overview" of amended part 13 in its entirety, once again indicating the desirability of continuing to reproduce the Official Comments in our Idaho Code volumes.

30-1-1302. Right to appraisal. — (1) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of, any of the following corporate actions:

(a) Consummation of a merger to which the corporation is a party:

(i) If shareholder approval is required for the merger by section 30-1-1104, Idaho Code, and the shareholder is entitled to vote on the merger, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger; or

(ii) If the corporation is a subsidiary and the merger is governed by section 30-1-1105, Idaho Code;

(b) Consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the exchange, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged;

(c) Consummation of a disposition of assets pursuant to section 30-1-1202, Idaho Code, if the shareholder is entitled to vote on the disposition;

(d) An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created; or

(e) Any other amendment to the articles of incorporation, merger, share exchange or disposition of assets to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors.

(2) Notwithstanding subsection (1) of this section, the availability of appraisal rights under subsections (1)(a), (b), (c) and (d) shall be limited in accordance with the following provisions:

(a) Appraisal rights shall not be available for the holders of shares of any class or series of shares which are:

(i) Listed on the New York stock exchange or the American stock exchange or designated as a national market system security on an interdealer quotation system by the national association of securities dealers, inc.; or

(ii) Not so listed or designated, but have at least two thousand (2,000) shareholders and the outstanding shares of such class or series have a

market value of at least twenty million dollars ($20,000,000), exclusive of the value of such shares held by its subsidiaries, senior executives, directors and beneficial shareholders owning more than ten percent (10%) of such shares.

(b) The applicability of subsection (2) (a) of this section shall be determined as of:

(i) The record date fixed to determine the shareholders entitled to receive notice of, and vote at, the meeting of shareholders to act upon the corporate action requiring appraisal rights; or

(ii) The day before the effective date of such corporate action if there is no meeting of shareholders.

(c) Subsection (2)(a) of this section shall not be applicable and appraisal rights shall be available pursuant to subsection (1) of this section for the holders of any class or series of shares who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity, that satisfies the standards set forth in subsection (2)(a) of this section at the time the corporate action becomes effective.

(d) Subsection (2)(a) of this section shall not be applicable and appraisal rights shall be available pursuant to subsection (1) of this section for the holders of any class or series of shares where:

(i) Any of the shares or assets of the corporation are being acquired or converted, whether by merger, share exchange or otherwise, pursuant to the corporate action by a person, or by an affiliate of a person, who:

(A) Is, or at any time in the one (1) year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, the beneficial owner of twenty percent (20%) or more of the voting power of the corporation, excluding any shares acquired pursuant to an offer for all shares having voting power if such offer was made within one (1) year prior to the corporate action requiring appraisal rights for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action; or

(B) Directly or indirectly has, or at any time in the one (1) year period immediately preceding approval by the board of directors of the corporation of the corporate action requiring appraisal rights had, the power, contractually or otherwise, to cause the appointment or election of twenty-five percent (25%) or more of the directors to the board of directors of the corporation; or

(ii) Any of the shares or assets of the corporation are being acquired or converted, whether by merger, share exchange or otherwise, pursuant to such corporate action by a person, or by an affiliate of a person, who is, or at any time in the one (1) year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the corporate action, a financial

benefit not generally available to other shareholders as such, other than:

(A) Employment, consulting, retirement or similar benefits established separately and not as part of or in contemplation of the corporate action; or

(B) Employment, consulting, retirement or similar benefits established in contemplation of, or as part of, the corporate action that are not more favorable than those existing before the corporate action or, if more favorable, that have been approved on behalf of the corporation in the same manner as is provided in section 30-1-862, Idaho Code; or

(C) In the case of a director of the corporation who will, in the corporate action, become a director of the acquiring entity in the corporate action or one (1) of its affiliates, rights and benefits as a director that are provided on the same basis as those afforded by the acquiring entity generally to other directors of such entity or such affiliate.

(e) For the purposes of subsection (2)(d) of this section only, the term "beneficial owner" means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares, provided that a member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities if the member is precluded by the rules of such exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted. When two (2) or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby shall be deemed to have acquired beneficial ownership, as of the date of such agreement, of all voting shares of the corporation beneficially owned by any member of the group.

(3) Notwithstanding any other provision of this section, the articles of incorporation as originally filed or any amendment thereto may limit or eliminate appraisal rights for any class or series of preferred shares, but any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately prior to the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within one (1) year of that date if such action would otherwise afford appraisal rights.

(4) A shareholder entitled to appraisal rights under this part may not challenge a completed corporate action for which appraisal rights are available unless such corporate action:

(a) Was not effectuated in accordance with the applicable provisions of part 10, 11 or 12 of this chapter or the corporation's articles of incorpora-

tion, bylaws or board of directors' resolution authorizing the corporate action; or

(b) Was procured as a result of fraud or material misrepresentation.

History.

I.C., § 30-1-1302, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 56, p. 907.

STATUTORY NOTES

Compiler's Notes.

The national association of securities dealers, inc., referred to in paragraph (2)(a)(i), was consolidated with the regulatory functions of NYSE Regulation, Inc., in 2007 to form the financial industry regulatory authority (FINRA). See *http://www.finra.org.*

JUDICIAL DECISIONS

Dissenter's Rights.

Because the shareholder was not a shareholder of the corporation at the time of the shareholder meeting, he was not entitled to vote on the sale or exchange of the corporation's assets at the shareholders' meeting held on that date; because he was not entitled to vote, he did not have rights as a dissenting shareholder and was not entitled to assert dissenters' rights. Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

ABA OFFICIAL COMMENT

1. TRANSACTIONS GIVING RISE TO DISSENTERS' RIGHTS. Section 1302(1) establishes the scope of appraisal rights by identifying those transactions which afford this right. In view of the significant degree of private ordering permitted by section 1302(1)(e), the scope of statutory appraisal provided is somewhat narrower than that provided in the 1984 Model Act. As discussed in the first section of the Official Comment to section 1301, statutory appraisal is made available only for corporate actions that will result in a fundamental change in the shares to be affected by the action and then only when uncertainty concerning the fair value of the affected shares may cause reasonable differences about the fairness of the terms of the corporate action. The transactions that satisfy both of these criteria are:

(1) A merger pursuant to section 1104 or a short-form merger pursuant to section 1105. Holders of any class or series that is to be exchanged or converted in connection with a merger under section 1104 are entitled both to a vote under section 1104(6) and to appraisal under section 1302(1)(a). Although shareholders of a subsidiary that is a party to a merger under section 1105 are not entitled to a vote, they are entitled to appraisal under 1302(1)(a) because their interests will be extinguished by the merger. Section 1302(1)(a)(i) denies appraisal rights to any class or series of shares in the surviving corporation if such class or series remains outstanding.

(2) A share exchange under section 1103 if the corporation is a party whose shares are being acquired in the exchange. Consistent with the treatment in section 1302(1)(a) of mergers requiring shareholder approval, subsection (b) provides appraisal only for those shares that will be exchanged.

(3) A disposition of assets requiring shareholder approval under section 1202. Minimally, shareholders of all classes or series of the corporation that are generally entitled to vote on matters requiring shareholder approval will be entitled to assert appraisal rights. Whether shares of a class or series that do not have general voting rights will be entitled to vote on the asset disposition and thus become entitled to appraisal rights depends on the form of the transaction disposing of the corporation's assets. In the usual form of this transaction, which is governed by part 12, the acquirer purchases substantially all of the assets and assumes substantially all of the liabilities of the corporation, which then liquidates pursuant to a plan of dissolution approved by the shareholders as part of the transaction and distributes the consideration received from the acquirer to its shareholders. If the transaction provides a non-voting class of preferred with its liquidation preference, there is no change in the contractual terms of the preferred and it is entitled neither to vote nor to appraisal rights. By the same token, a preferred class cannot be required to accept any consideration different from that called for in its liquidation preference without amending the terms of the class. For example, a plan that called for the preferred to accept securities of the acquirer in lieu of its

cash liquidation preference would trigger both group voting and appraisal rights on behalf of the class. In the unusual event that the asset disposition plan contemplated that the corporation would continue in existence, the terms of a non-voting class would not have been changed as a result of the transaction, and appraisal rights would not be available. As provided in section 1202(7), a disposition of assets by a corporation in the course of dissolution under part 14 is governed by that part, not part 12, and thus does not implicate appraisal rights.

(4) Amendments to the articles of incorporation that effectuate a reverse stock split which reduces the number of shares that a shareholder owns of a class or series to a fractional share if the corporation has the obligation or right to repurchase the fractional share so created. The reasons for granting appraisal rights in this situation are similar to those granting such rights in cases of cash-out mergers, as both transactions could compel affected shareholders to accept cash for their investment in an amount established by the corporation. Appraisal is afforded only for those shareholders of a class or series whose interest is so affected.

(5) Any other merger, share exchange, disposition of assets or amendment to the articles to the extent the articles, bylaws, or a resolution of the board of directors grants appraisal rights to a particular class or series of stock. A corporation may voluntarily wish to grant to the holders of one or more of its classes or series of shares appraisal rights in connection with these important transactions whenever the Act does not provide statutory appraisal rights. The grant of appraisal rights may satisfy shareholders who might, in the absence of appraisal rights, seek other remedies. Moreover, in situations where the existence of appraisal rights may otherwise be disputed, the voluntary offer of those rights under this section may avoid litigation. Obviously, an express grant of voluntary appraisal rights under section 1302(1)(e) is intended, to override any of the exceptions to the availability of appraisal rights in section 1302(1). Any voluntary grant of appraisal rights by the corporation to the holders of one or more of its classes or series of shares will thereby automatically make all of the provisions of part 13 applicable to the corporation and such holders regarding this corporate action.

(6) A domestication in which the shares held by a shareholder are reclassified in a manner that results in the shareholder holding shares either with terms that are not as favorable in all material respects or representing a smaller percentage of the total outstanding voting rights in the corporation as those held before the domestication. Appraisal rights are not provided if the shares of a shareholder are otherwise reclassified so long as the foregoing restrictions are satisfied.

2. MARKET EXCEPTION TO APPRAISAL RIGHTS. Part 13 provides a limited exception to appraisal rights for those situations where shareholders can either accept the consideration offered in the appraisal-triggering transaction or can obtain the fair value of their shares by selling them in the market. This provision is predicated on the theory that where an efficient market exists, the market price will be an adequate proxy for the fair value of the corporation's shares, thus making appraisal unnecessary. Furthermore, after the corporation announces an appraisal-triggering action, the market operates at maximum efficiency with respect to that corporation's shares because interested parties and market professionals evaluate the offer and competing offers may be generated if the original offer is deemed inadequate. Moreover, the market exception reflects an evaluation that the uncertainty, costs and time commitment involved in any appraisal proceeding are not warranted where shareholders can sell their shares in an efficient, fair and liquid market. For these reasons, approximately half of the states have enacted market exceptions to their appraisal statutes.

For purposes of this part, the market exception is provided for a class or series if two criteria are met: the market in which the class or series is traded must be "liquid" and the value of the shares established by the appraisal-triggering event must be "reliable." Liquidity is defined in section 1302(2)(a) and requires the class or series of stock to satisfy either of two requirements: the class or series is either listed on the New York Stock Exchange or the American Stock Exchange or is designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or, although not so listed or designated, the class or series has at least 2,000 record or beneficial shareholders, provided that using both concepts does not result in duplication. In this instance, the outstanding class or series must also have a market value of at least $20 million, excluding the value of shares held by the corporation's subsidiaries, senior executives, directors and beneficial shareholders owning more than 10 percent of the class or series.

Because section 1302(2)(c) excludes from the market exception those transactions that require shareholders to accept anything other than cash or securities that also meet the liquidity tests of section 1302(2)(a), shareholders are assured of receiving either appraisal rights, cash from the transaction, or shares or other proprietary interests in the survivor entity that are liquid. Section 1302(2)(b) provides that the corporation generally must satisfy the requirements of section 1302(2)(a) on the record date for a shareholder vote on the appraisal-

triggering transaction. For purposes of subsection 1302(1)(a)(ii), the requirements of section 1302(2)(a) must be met as of the day before the corporate action becomes effective.

3. APPRAISAL RIGHTS IN CONFLICT TRANSACTIONS. The premise of the market exception is that the market must be liquid and the valuation assigned to the relevant shares must be "reliable." Section 1302(2)(a) is designed to assure liquidity. For purposes of these provisions, section 1302(2)(d) is designed to assure reliability by recognizing that the market price of, or consideration for, shares of a corporation that proposes to engage in a section 1302(1) transaction may be subject to influences where a corporation's management, controlling shareholders or directors have conflicting interests that could, if not dealt with appropriately, adversely affect the consideration that otherwise could have been expected. Section 1302(2)(d) addresses two groups of conflict transactions: those in clause (i), which involve controlling shareholders; and those in clause (ii), which involve senior executives and directors.

Section 1302(2)(d)(i) covers two possible conflict situations: subsection (A) covers the acquisition or exchange of shares or assets of the corporation by a shareholder or an affiliate of the shareholder that could be considered controlling by virtue of ownership of a substantial amount of voting stock (20 percent); and subsection (B) covers the acquisition or exchange of shares or assets of the corporation by an individual or group, or by an affiliate of such individual or group, that has the ability to exercise control, through contract, stock ownership, or some other means, over at least one fourth of the board's membership. The definition of "beneficial owner" in section 1302(2)(e) serves to identify possible conflict situations by deeming each member of a group that agrees to vote in tandem to be a beneficial owner of all the voting shares owned by the group. In contrast, the term "beneficial shareholder," as defined in section 1301(2), is used to identify those persons entitled to appraisal rights. The last portion of subsection (A) recognizes that an acquisition effected in two steps (a tender offer followed by a merger) within one year, where the two steps are either on the same terms or the second step is on terms that are more favorable to target shareholders, is properly considered a single transaction for purposes of identifying conflict transactions, regardless of whether the second-step merger is governed by sections 1104 or 1105.

Section 1302(2)(d)(ii) covers the acquisition or exchange of shares or assets of the corporation by a person, or an affiliate of a person, who is, or in the year leading up to the transaction was, a senior executive or director of the corporation. The section eliminates the market exception for management buyouts because participation in the buyout group is itself "a financial benefit not available to other shareholders as such." The market exception is also not available for transactions involving other types of economic benefits (in addition to benefits afforded to shareholders generally, as such) afforded to senior executives (as defined in section 1301(8)) and directors in specified conflict situations, unless specific objective or procedural standards are met. Section 1301(1) specially defines the term "affiliate" for purposes of section 1302(2)(d) to include an entity of which a person is a senior executive. Due to this specialized definition, if a senior executive of the corporation is to continue and is to receive enumerated employment and other financial benefits after the transaction, the availability of the market exception will depend on meeting one of the three conditions specified in clauses (A), (B) and (C) of section 1302(2)(d)(ii).

First, under section 1302(2)(d)(ii)(A), the market exception is not lost if financial benefits that result from the transaction consist of employment, consulting, retirement or similar benefits established separately and not in contemplation of the transaction. For example, if an individual has an arrangement under which benefits will be triggered on a "change of control," such as accelerated vesting of options, retirement benefits, deferred compensation and similar items, or is afforded the opportunity to retire or leave the employ of the enterprise with more favorable economic results than would be the case absent a change of control, the existence of these arrangements would not disqualify the transaction from the market exception if the arrangements had been established as a general condition of the individual's employment or continued employment, rather than in contemplation of the particular transaction. Second, under section 1302(2)(d)(ii)(B), if such arrangements are established as part of, or as a condition of, the transaction, the market exception will not be lost if the arrangements are either not more favorable than those already in existence or, if more favorable, are approved by "qualified" directors (i.e., meeting the standard of independence specified in section 862(4)), in the same manner as is provided for conflicting interest transactions generally with the corporation under section 862. This category would include arrangements with the corporation which have been negotiated as part of, or as a condition of, the transaction or arrangements with the acquiring company or one or more of its other subsidiaries. The third situation, delineated in section 1302(2)(d)(ii)(C), addresses a person who is a director of the issuer and, in connection with the transaction, is to become a director of the acquiring entity or its parent, or to continue as a director of the corporation when it becomes a subsidiary of the acquiring entity.

In this situation, the market exception is not lost as long as that person will not be treated more favorably as a director than are other persons who are serving in the same director positions.

4. ELIMINATION OF APPRAISAL RIGHTS FOR PREFERRED SHARES. Section 1302(3) permits the corporation to eliminate or limit appraisal rights for the holders of one or more series or classes of preferred shares. The operative provisions may be set forth in the corporation's articles of incorporation as originally filed or in any amendment thereto, but any such amendment will not become effective for one year with respect to outstanding shares or shares which the corporation is or may be required to issue or sell at some later date pursuant to any rights outstanding prior to such amendment becoming effective. Shareholders who have not yet acquired, or do not have a right to acquire from the corporation, any shares of preferred stock, should have the ability either not to acquire any shares of preferred stock or to have appraisal rights granted or restored for such shares, if such shareholders so desire, before purchasing them. In contrast, because the terms of common shares are rarely negotiated, section 1302 does not permit the corporation to eliminate or limit the appraisal rights of common shares.

5. EXCLUSIVITY OF APPRAISAL RIGHTS. With three exceptions, section 1302(4) provides that appraisal is the exclusive remedy for a corporate action that has been completed.

The theory underlying this section is that when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous. The very existence of the appraisal remedy recognizes that shareholders may disagree about the financial consequences that a corporate action may have and some may hold such strong views that they will want to vindicate them in a judicial proceeding. Since a judicial proceeding is insulated from the dynamics of an actual negotiation, it is not surprising that the two processes could produce different valuations. Accordingly, if such a proceeding results in an award of additional consideration to the shareholders who pursued appraisal, no inference should be drawn that the judgment of the majority was wrong or that compensation is now owed to shareholders who did not seek appraisal. Thus, an exclusivity principle is generally justified.

Nevertheless, there may be exceptional circumstances where judicial review of a completed transaction is warranted. The same reasoning that supports the provision of appraisal rights for conflict of interest transactions described in section 1302(2)(c) and (d) supports the decision in the first clause of section 1302(4) not to preclude judicial review of such transactions for fairness. Similarly, there may be instances where the process by which the corporate action was approved was so flawed that it is appropriate to provide more general relief on behalf of all affected shareholders. Thus section 1302(4)(a) does not preclude challenges to serious procedural defects in approving the action, such as a failure to obtain the votes required by statute or by the corporation's own articles, bylaws, or board resolution authorizing the transaction. Similarly, subsection (b) creates an exception for cases where fraud or material misrepresentation have affected the shareholder vote to such an extent as to have caused the corporate action to be approved mistakenly. The concept of misrepresentation includes the omission of a material fact necessary to make statements made not misleading.

Although section 1302(4) does not address the question of remedies, such as injunctive relief, that may be available before the corporate action is effected, it should be noted that a complaint based solely on adequacy of consideration is not actionable unless accompanied by credible allegations of wrongdoing. Since section 1302(4) is concerned with challenges only to the corporate action, it does not address remedies, if any, that shareholders may have against directors or other persons as a result of the corporate action. See section 831 and Official Comment.

IDAHO REPORTER'S COMMENT

When first enacted in Idaho in 1997, Model Act section 1302 was based largely on its predecessor, old I.C. § 30-1-80. It was clarified in 1997 that appraisal rights were limited to shareholders entitled to vote on the triggering transaction and that appraisal rights applied to an articles amendment involving a "cash out" effectuated by a reverse share split. The 1997 revision also added a "market exception" withholding appraisal rights in transactions where the consideration consisted of publicly traded shares.

Section 1302 seems the "centerpiece" of the 2004 rewrite of part 13, since it describes the situations wherein appraisal rights will exist. The 2004 amendments significantly narrowed the list of corporate transactions giving rise to appraisal rights, with the exception of the reverse stock split described in section 1302(1)(d). Appraisal rights are available only for holders of shares that are exchanged or converted in a merger or share exchange. Subject to the market exception provided in 1302(2), appraisal rights may be available to the shareholders in

the corporation whose assets are acquired under section 1202, but appraisal is no longer made available for dispositions in the course of dissolution under part 14. New section 1302(3) authorizes an article provision eliminating or limiting appraisal rights for any class or series of preferred shares, as defined in section 1301(6). At the same time, however, section 1302(1)(e) permits appraisal rights to be made available by article or bylaw provision or by simple board resolution for any merger, share exchange, disposition of assets or amendment to the articles for which statutory appraisal rights are not provided.

A "market exception," withholding appraisal rights in transactions where both corporate parties were publicly traded and the consideration consisted of other publicly traded shares or cash was added to our statute in 1997. The 2004 amendments provided a somewhat expanded market exception in section 1302(2), with, however, some important and innovative exceptions. The scope of section 1302(2)(c) has been broadened to include proprietary interests of noncorporate entities, provided that such interests meet the liquidity tests specified in section 1302(2)(a). The market exception is withdrawn and appraisal rights are available for any conflicting interest transaction, section 1303(2)(d).

Finally, the exclusivity provision in amended section 1302(4) is more sharply focused than its predecessor (I.C. § 30-1-1302(2)). The old provision provided that appraisal was the exclusive remedy for a shareholder challenge to a corporate action giving rise to appraisal rights unless the transaction was "unlawful or fraudulent with respect to the shareholder or the corporation." As amended, section 1302(4) makes appraisal the exclusive remedy with regard to completed corporation action, excepting only serious procedural defects as described in subsection (4)(a) or instances in which the corporate action was "procured as a result of fraud or material misrepresentation," as provided in subsection (4)(b).

30-1-1303. Assertion of rights by nominees and beneficial owners. — (1) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder only if the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

(2) A beneficial shareholder may assert appraisal rights as to shares held on behalf of the shareholder only if such shareholder:

(a) Submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in section 30-1-1322(2)(b)(ii), Idaho Code; and

(b) Does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder.

History.

I.C., § 30-1-1303, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 57, p. 907.

ABA OFFICIAL COMMENT

Section 1303 addresses the relationship between those who are entitled to assert appraisal rights and the widespread practice of nominee or street name ownership of publicly-held shares. Generally, a shareholder must demand appraisal for all the shares of a class or series which the shareholder owns. If a record shareholder is a nominee for several beneficial shareholders, some of whom wish to demand appraisal and some of whom do not, section 1303(1) permits the record shareholder to assert appraisal rights with respect to a portion of the shares held of record by the record shareholder but only with respect to all the shares beneficially owned by a single person. This limitation is necessary to prevent abuse by a single

beneficial shareholder who is not fundamentally opposed to the proposed corporate action but who may wish to speculate on the appraisal process, as to some of that shareholder's shares, on the possibility of a high payment. On the other hand, a shareholder who owns shares in more than one class or series may assert appraisal rights for only some but not all classes or series that the shareholder owns. This is permitted because fair treatment of one class or series does not guarantee fair treatment of other classes or series.

Section 1303(1) also requires a record shareholder who demands appraisal with respect to a portion of the shares held by the record shareholder to notify the corporation of the name and address of the beneficial owner on whose behalf the record shareholder has demanded appraisal rights.

Section 1303(2) permits a beneficial shareholder to assert appraisal rights directly if the beneficial shareholder submits the record shareholder's written consent. Although generally the record shareholder is treated as the owner of shares, this section recognizes that sometimes the record shareholders are holding shares on behalf of beneficial shareholders. It would be foreign to the premises underlying nominee and street name ownership to require these record shareholders to forward demands and participate in litigation on behalf of their clients. In order to make appraisal rights effective without burdening record shareholders, beneficial shareholders should be allowed to assert their own claims as provided in this subsection. The beneficial shareholder is required to submit, no later than the date specified in section 1322(2)(b)(ii), a written consent by the record shareholder to the assertion of appraisal rights to verify the beneficial shareholder's entitlement and to permit the protection of any security interest in the shares. In practice, a broker's customer who wishes to assert appraisal rights may request the broker to supply the customer with the name of the record shareholder (which may be a house nominee or a nominee of the Depository Trust Company), and a form of consent signed by the record shareholder. At the same time, the customer may want to obtain certificates for the shares so that they may be deposited pursuant to section 1323. After the corporation has received the form of consent, the corporation must deal with the beneficial shareholder.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1303 was based on prior I.C. § 30-1-80(b), with stylistic changes. The three new definitions added to section 1301 in 1997 ("record shareholder," "beneficial shareholder," and "shareholder") led to several clarifying changes in the language of section 1303.

The 2004 changes here were purely stylistic.

30-1-1304 — 30-1-1319. [Reserved.]

30-1-1320. Notice of appraisal rights. — (1) If proposed corporate action described in section 30-1-1302(1), Idaho Code, is to be submitted to a vote at a shareholders' meeting, the meeting notice must state that the corporation has concluded that shareholders are, are not or may be entitled to assert appraisal rights under this part. If the corporation concludes that appraisal rights are or may be available, a copy of this part must accompany the meeting notice sent to those record shareholders entitled to exercise appraisal rights.

(2) In a merger pursuant to section 30-1-1105, Idaho Code, the parent corporation must notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice must be sent within ten (10) days after the corporate action became effective and include the materials described in section 30-1-1322, Idaho Code.

History.

I.C., § 30-1-1320, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 58, p. 907.

ABA OFFICIAL COMMENT

Before a vote is taken on a corporate action, the corporation is required by section 1320(1) to notify record shareholders that a transaction is proposed and that the corporation has concluded either that appraisal rights are or are not available; alternatively, if the corporation is unsure about the availability of appraisal rights, it may state that appraisal rights may be available. Notice of appraisal rights is needed because many shareholders do not know what appraisal rights they may have or how to assert them. If the corporation has concluded appraisal rights are or may be available, the notice must be accompanied by a copy of this part.

Section 1320(2) provides that notice be given by the parent corporation within ten days after the effective date of a merger of its subsidiary under section 1105. This notice may be combined with the notice required by section 1322.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1320(1) was based on prior I.C. § 30-1-81(b), and section 1320(2) was based on the second sentence of old I.C. § 30-1-81(d). Both subsections included stylistic and clarifying changes.

As amended in 2004, section 1320(1) retains the requirements in prior I.C. § 30-1-1320(1) that the meeting notice state whether appraisal rights are or may be available and adds a requirement that the corporation specifically state appraisal rights are not available if that is the case. Amended section 1320(2) requires the corporation to provide a copy of the statutory appraisal part if it states that appraisal rights are or may be available. Subsection (2) formerly referred to any appraisal-triggering action taken without a shareholder vote; that reference is now to the short-form merger under section 1105 since that is the only such transaction that gives rise to appraisal but does not require approval by shareholders of the affected corporation.

30-1-1321. Notice of intent to demand payment. — (1) If proposed corporate action requiring appraisal rights under section 30-1-1302, Idaho Code, is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(a) Must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment if the proposed action is effectuated; and

(b) Must not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action.

(2) A shareholder who does not satisfy the requirements of subsection (1) of this section is not entitled to payment under this part.

History.

I.C., § 30-1-1321, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 59, p. 907.

ABA OFFICIAL COMMENT

Section 1321 applies to all transactions requiring appraisal, except short-form mergers under section 1105. In the latter case, shareholders of the subsidiary do not vote on the transaction but are nevertheless entitled to appraisal.

Section 1321(1) requires the shareholder to give notice of an intent to demand payment before the vote on the corporate action is taken. This notice enables the corporation to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice during the remainder of the appraisal process.

In order for a shareholder to remain eligible to demand payment, section 1321(1)(b) mandates that the shareholder must not vote (or, in the case of a beneficial shareholder, cause or permit to be voted) any shares of any class or series for which the shareholder is demanding appraisal in favor of the proposal.

IDAHO REPORTER'S COMMENT

Prior to our 1997 adoption of Model Act § 1321, Idaho and Ohio were the only jurisdictions that did not require the shareholder to notify the corporation of her intent to dissent before the shareholders' meeting or before the vote on the particular action is taken. In the words of the Idaho bar committee at the time of the 1979 revision, "...this requirement unduly limited dissenting rights. Many shareholders are not sufficiently informed of corporate action and dissenting rights to properly give such a notice prior to the vote on the issue." So Model Act § 1321, subsection (1)(a) changed prior Idaho law. The 1997 revisers determined that Idaho should adopt this provision in keeping with all other jurisdictions, except Ohio.

Subsection (1)(b), the other hand, simply restated the prior requirement that Idaho shared with all jurisdictions.

There was only one arguably substantive change in the 2004 amendment of section 1321. The addition in subsection (1)(b) of the phrase "or cause or permit to be voted" clarified the responsibility of a beneficial owner to give appropriate instructions to the record holder in order to preserve appraisal rights.

30-1-1322. Appraisal notice and form. — (1) If proposed corporate action requiring appraisal rights under section 30-1-1302, Idaho Code, becomes effective, the corporation must deliver a written appraisal notice and form required by subsection (2)(a) of this section to all shareholders who satisfied the requirements of section 30-1-1321, Idaho Code. In the case of a merger under section 30-1-1105, Idaho Code, the parent must deliver a written appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

(2) The appraisal notice must be sent no earlier than the date the corporate action became effective and no later than ten (10) days after such date and must:

(a) Supply a form that specifies the date of the first announcement to shareholders of the principal terms of the proposed corporate action and requires the shareholder asserting appraisal rights to certify:

(i) Whether or not beneficial ownership of those shares for which appraisal rights are asserted was acquired before that date; and

(ii) That the shareholder did not vote for the transaction;

(b) State:

(i) Where the form must be sent and where certificates for certificated shares must be deposited and the date by which those certificates must be deposited, which date may not be earlier than the date for receiving the required form under subsection (2)(b)(ii) of this section;

(ii) A date by which the corporation must receive the form, which date may not be fewer than forty (40) nor more than sixty (60) days after the date the appraisal notice and form in subsection (1) of this section are sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date;

(iii) The corporation's estimate of the fair value of the shares;

(iv) That, if requested in writing, the corporation will provide, to the shareholders so requesting, within ten (10) days after the date specified in subsection (2)(b)(ii) of this section the number of shareholders who return the forms by the specified date and the total number of shares owned by them; and

(v) The date by which the notice to withdraw under section 30-1-1323, Idaho Code, must be received, which date must be within twenty (20) days after the date specified in subsection (2)(b)(ii) of this section; and

(c) Be accompanied by a copy of this part.

History.

I.C., § 30-1-1322, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 60, p. 907.

ABA OFFICIAL COMMENT

The purpose of section 1322 is to require the corporation to provide shareholders with information and a form for perfecting appraisal rights. The content of this notice and form are spelled out in detail to ensure that they accomplish this purpose.

When an action is submitted to the vote of shareholders, the appraisal notice must be sent only to those persons who gave notice of their intention to demand appraisal under section 1321 and did not vote (or permit or cause to be voted) such shares in favor of the proposed action. In a short-form merger under section 1105, the notice must be sent to all persons who may be eligible for appraisal rights no earlier than the effective date of the merger and no later than ten days thereafter. In either case, the notice must be accompanied by a copy of this part.

The notice must supply a form to be used by the person asserting appraisal rights in order to complete the exercise of those rights. Under section 1322(2)(b)(ii), the notice must specify the date by which the shareholder's executed form must be received by the corporation, which date must be at least 40 days but not more than 60 days after the appraisal notice is sent.

Under section 1322(2)(b)(i), the notice must also specify where and when share certificates must be deposited; the time for deposit may not be set at a date earlier than the date for receiving the required form under section 1322(2)(b)(ii).

Sections 1322(2)(a) and (b)(i) require the corporation to specify in the form supplied for demanding payment where the form must be sent as well as the date of the first announcement of the terms of the proposed corporate action. This is the critical date for determining the rights of shareholder-transferees: persons who became shareholders prior to that date are entitled to full appraisal rights, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by section 1325. See the Official Comments to sections 1323 and 1325. The date set forth in the form should be the date the principal terms of the transaction were announced by the corporation to shareholders. This may be the day the terms were communicated directly to the shareholders, included in a public filing with the Securities and Exchange Commission, published in a newspaper of general circulation that can be expected to reach the financial community, or any earlier date on which such terms were first announced by any other person or entity to such persons or sources. Any announcement to news media or to shareholders that relates to the proposed transaction but does not contain the principal terms of the transaction to be authorized at the shareholders' meeting is not considered to be an announcement for the purposes of section 1322.

Sections 1322(2)(b)(iii) and (2)(b)(iv) require the corporation to state its estimate of the fair value of the shares and how shareholders may obtain the number of shareholders and number of shares demanding appraisal rights. The information required by sections 1322(2)(b)(iii) and (2)(b)(iv) is intended to help shareholders assess whether they wish to demand payment or to withdraw their demand for appraisal, but the information under section 1322(2)(b)(iv) is required to be sent only to those shareholders from whom the corporation has received a written request. If such request is received, the corporation must respond within ten days after forms are due pursuant to section 1322(2)(b)(ii). Finally, section 1322(2)(b)(v) requires the corporation to specify the date by which the shareholder's notice to withdraw under section 1323 must be received.

IDAHO REPORTER'S COMMENT

Under pre-1997 I.C. § 30-1-81(d), the required notice went to all shareholders who did not vote in favor of the proposed action. Post-1997 Model Act § 1322(1) requires notice only to those shareholders who themselves noticed the corporation under section 1321(1)(a). Again, our pre-1997 law was more "shareholder friendly." But only Ohio remained so friendly, and the 1997 revisers decided to opt for uniformity here.

Subsection (2) largely tracked prior I.C. § 30-1-81(d), with the following minor changes:

(1) specification that the notice must go out within ten (10) days after the corporate action at issue;

(2) additional detail in subsection (2)(c) requiring certain information be provided on the form for demanding payment; and

(3) an outside limit of sixty (60) days within which the payment demand must be received.

The most significant 2004 changes in section 1322 were (1) the requirement that the information specified in subsections (2)(iii), (iv) and (v) also be included with the notice; and (2) the requirement in subsection (2) that the notice be sent no earlier than the effective date of the corporate action giving rise to appraisal rights.

There were also stylistic changes in 2004 to section 1322.

30-1-1323. Perfection of rights — Right to withdraw. — (1) A shareholder who receives notice pursuant to section 30-1-1322, Idaho Code, and who wishes to exercise appraisal rights must certify on the form sent by the corporation whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 30-1-1322(2)(a), Idaho Code. If a shareholder fails to make this certification, the corporation may elect to treat the shareholder's shares as after-acquired shares under section 30-1-1325, Idaho Code. In addition, a shareholder who wishes to exercise appraisal rights must execute and return the form and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 30-1-1322(2)(b)(ii), Idaho Code. Once a shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns the executed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to subsection (2) of this section.

(2) A shareholder who has complied with subsection (1) of this section may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation in writing by the date set forth in the appraisal notice pursuant to section 30-1-1322(2)(b)(v), Idaho Code. A shareholder who fails to so withdraw from the appraisal process may not thereafter withdraw without the corporation's written consent.

(3) A shareholder who does not execute and return the form and, in the case of certificated shares, deposit that shareholder's share certificates where required, each by the date set forth in the notice described in section 30-1-1322(2), Idaho Code, shall not be entitled to payment under this part.

History.

I.C., § 30-1-1323, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 61, p. 907.

ABA OFFICIAL COMMENT

Section 1323 permits shareholders to perfect their appraisal rights under subsection (1), subject to their right to withdraw under subsection (2). In the case of a transaction involving a vote by shareholders, returning the executed form and, in the case of certificated shares, depositing the shares are the shareholder's confirmation of the shareholder's intention expressed earlier under section 1321(1) to pursue appraisal rights; in the case of a merger of a subsidiary under section 1105, it is the shareholder's first statement of this position.

The shareholder should include on the appraisal form a certification as to whether the date on which the beneficial shareholder acquired beneficial ownership of the shares was before (or on or after) the date the transaction was announced. See section 1322(2)(a). This information permits the corporation to exercise its right under section 1325 to defer payment of compen-

sation for certain shares. The corporation may elect to proceed under section 1325 with respect to those shareholders who fail to make the required certification.

Section 1323(1) also requires persons with certificated shares who file the required form to deposit their share certificates as directed by the corporation in its appraisal notice. Once a shareholder deposits that shareholder's shares, that shareholder loses all rights as a shareholder unless the shareholder withdraws from the appraisal process pursuant to section 1323(2).

With respect to certificated shares, this provision differs from many statutes in that the certificates are deposited for retention, rather than "submitted for notation." This difference reflects the requirement in section 1322(2)(b)(i) for deposit only after the corporate action became effective; in contrast, many state statutes require shareholders to send in their certificates in anticipation of the effectuation of the proposed corporate action.

Alternatively, under section 1323(2), a shareholder may withdraw from the appraisal process by so notifying the corporation in writing by the deadline set forth in the appraisal notice. After that date, however, a shareholder who has complied with the requirements to execute and return the form and, in the case of certificated shares, deposit the share certificates may not withdraw from the process without the corporation's written consent.

Under section 1323(3), a shareholder who fails to execute and return the form with respect to the shares of a class or series for which the shareholder is demanding appraisal or does not deposit that shareholder's share certificates as required by section 1323(1) loses all rights to pursue appraisal and obtain payment under this part. If a beneficial shareholder wishes to assert appraisal rights in place of the record shareholder, the beneficial shareholder must also comply with section 1303(2).

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1323, subsection (1) made express what was implicit in prior I.C. § 30-1-81(e)'s first sentence, namely the requirement that the shareholder file a formal demand for payment. Subsection (1) also required that the shareholder deposit certificates and certify when he obtained ownership of the shares, both as contemplated in other provisions of part 13.

Subsection (2) was based on prior I.C. § 30-1-81(e)'s first sentence, with stylistic changes.

We added to the Official Text in subsections (1) and (2) the references to "certificated shares."

The principal changes to section 1323 resulting from the 2004 amendments reflect the amendment to section 1322(2)(a) providing that the notice and form required by that section be sent no earlier than the date the corporate action became effective. As a result, section 1323(1) contemplates that the certificates deposited by the shareholder will lose all rights as a shareholder upon their deposit, unless the shareholder subsequently exercises the limited right of withdrawal provided by section 1323(2). By specifying the effective date of the corporate action as the earliest date the section 1322 notice and form may be sent, the share transfer restrictions for uncertified shares previously provided in section 1324 became necessary and have been eliminated by the 2004 amendments. Similarly, former section 1326, specifying procedures to be followed if the corporation fails to take the corporate action within 60 days of the date set for demanding payment and depositing shares was deleted in 2004.

30-1-1324. Payment. — (1) Except as provided in section 30-1-1325, Idaho Code, within thirty (30) days after the form required by section 30-1-1322(2)(b)(ii), Idaho Code, is due, the corporation shall pay in cash to those shareholders who complied with section 30-1-1323(1), Idaho Code, the amount the corporation estimates to be the fair value of their shares, plus interest.

(2) The payment to each shareholder pursuant to subsection (1) of this section must be accompanied by:

(a) Financial statements of the corporation that issued the shares to be appraised, consisting of a balance sheet as of the end of a fiscal year ending not more than sixteen (16) months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;

(b) A statement of the corporation's estimate of the fair value of the shares, which estimate must equal or exceed the corporation's estimate given pursuant to section 30-1-1322(2)(b)(iii), Idaho Code; and

(c) A statement that shareholders described in subsection (1) of this section have the right to demand further payment under section 30-1-1326, Idaho Code, and that if any shareholder does not do so within the time period specified therein, such shareholder shall be deemed to have accepted such payment in full satisfaction of the corporation's obligations under this part.

History.

I.C., § 30-1-1325, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 63, p. 907.

STATUTORY NOTES

Prior Laws.

Former § 30-1-1324, as added by S.L. 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 62.

Compiler's Notes.

This section was formerly compiled as § 30-1325.

ABA OFFICIAL COMMENT

Section 1324 is applicable both to shareholders who have complied with section 1323(1), as well as to shareholders who are described in section 1325(1) if the corporation so chooses. The corporation must, however, elect to treat all shareholders described in section 1325(1) either under section 1324 or under section 1325; it may not elect to treat some shareholders from this group under section 1324 but treat others under section 1325. Considerations of simplicity and harmony may prompt the corporation to elect to treat all shareholders under section 1324.

Section 1324 changes the relative balance between the corporation and shareholders demanding appraisal by requiring the corporation to pay in cash within 30 days after the required form is due the corporation's estimate of the fair value of the stock plus interest. Section 1324(2)(b) requires that estimate to at least equal the corporation's estimate of fair value given pursuant to section 1322(2)(b)(iii). Since under section 1323(1) all rights as a shareholder are terminated with the deposit of that shareholder's shares, the former shareholder should have immediate use of such money. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed. Thus, the corporation must pay its estimate of fair value, plus interest from the effective date of the corporate action, without waiting for the conclusion of the appraisal proceeding.

Since the former shareholder must decide whether or not to accept the payment in full satisfaction, the corporation must at this time furnish the former shareholder with the information specified in section 1324(2), with a reminder of the former share-holder's further rights and liabilities.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1325 (the predecessor to current section 1324) was based on prior I.C. § 30-1-81(f)(3), with stylistic changes. Subsection (2)(c) was new in 1997, the idea being that provision of such information is appropriate when payment is made.

After the 2004 amendments, since appraisal notice and form under section 1322 will now be sent not earlier than the effective date of the corporate action for which appraisal is sought, amended section 1324(1) provides that payment of the corporation's estimate of fair value is due within 30 days of the shareholder's perfection of appraisal rights. Section 1324(2) was amended in 2004 to clarify that the financial statements to be provided are those of the corporation that issued the shares to be appraised, that the corporation's estimate of fair value must at least equal its estimate provided under section 1322(2)(b), and that the consequences, for the shareholder, of failing to demand further payment under section 1326 within the time allowed be specified.

30-1-1325. After-acquired shares. — (1) A corporation may elect to

withhold payment required by section 30-1-1324, Idaho Code, from any shareholder who did not certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was acquired before the date set forth in the appraisal notice sent pursuant to section 30-1-1322(2)(a), Idaho Code.

(2) If the corporation elected to withhold payment under subsection (1) of this section, it must, within thirty (30) days after the form required by section 30-1-1322(2)(b)(ii), Idaho Code, is due, notify all shareholders who are described in subsection (1) of this section:

(a) Of the information required by section 30-1-1324(2)(a), Idaho Code;

(b) Of the corporation's estimate of fair value pursuant to section 39-1-1324(2)(b) [30-1-1324(2)(b)], Idaho Code;

(c) That they may accept the corporation's estimate of fair value, plus interest, in full satisfaction of their demands or demand appraisal under section 30-1-1326, Idaho Code;

(d) That those shareholders who wish to accept such offer must so notify the corporation of their acceptance of the corporation's offer within thirty (30) days after receiving the offer; and

(e) That those shareholders who do not satisfy the requirements for demanding appraisal under section 30-1-1326, Idaho Code, shall be deemed to have accepted the corporation's offer.

(3) Within ten (10) days after receiving the shareholder's acceptance pursuant to subsection (2) of this section, the corporation must pay in cash the amount it offered under subsection (2)(b) of this section to each shareholder who agreed to accept the corporation's offer in full satisfaction of the shareholder's demand.

(4) Within forty (40) days after sending the notice described in subsection (2) of this section, the corporation must pay in cash the amount it offered to pay under subsection (2)(b) of this section to each shareholder described in subsection (2)(e) of this section.

History.
I.C., § 30-1-1327, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 65, p. 907.

STATUTORY NOTES

Compiler's Notes.
This section was formerly compiled as § 30-1-1327.

Former § 30-1-1325 was amended and redesignated as § 30-1-1324 by S.L. 2004, ch. 324 § 63.

The bracketed reference in paragraph (2)(b) was inserted by the compiler to correct the statutory reference.

ABA OFFICIAL COMMENT

Section 1325(1) gives the corporation the option to treat differently shares acquired on or after the date of public announcement of the proposed corporate action; this date is specified by the corporation in its appraisal notice under section 1322(2)(a). At the corporation's option, holders of shares acquired on or after this date, or shareholders who fail to certify otherwise under section 1323(1), are not entitled to immediate payment under section 1324. Instead, shareholders described in subsection (1) may receive only an offer of payment which is conditioned on their agreement to accept it in full satisfaction of their claim. If the right of unconditional immediate payment were granted as to all after-acquired shares, speculators

and others might be tempted to buy shares merely for the purpose of demanding appraisal. Since the function of appraisal rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to purchasers who knew or should have known about the proposed changes.

The date used as a cut-off for determining the application of this section is when "the principal terms" of the transaction are first announced to shareholders or to a newspaper of general circulation that can be expected to reach the financial community or included in a public filing with the Securities and Exchange Commission. The cut-off should not be set at an earlier date, such as when the first public statement that the corporate action was under consideration was made, because the goal of this section is to prevent use of appraisal rights as a speculative device after the terms of the transaction are announced. See the Official Comment to section 1322.

Section 1325(2) requires the corporation to furnish specified information to all shareholders described in subsection (1) and offer them the option of accepting the corporation's estimate of fair value plus interest, in full satisfaction of their claims, provided that such shareholders so accept and notify the corporation within ten days of receiving this offer. Within ten days after receiving a shareholder's acceptance, the corporation must pay that shareholder in cash the stated fair value plus interest.

A shareholder may accept the offered payment in full satisfaction of that shareholder's claim; alternatively, a shareholder may reject the corporation's offer and demand a judicial determination under section 1326 and payment of the amount so determined at the termination of the proceeding. A shareholder who does not satisfy the requirements of section 1326 shall be deemed to have accepted the corporation's offer.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1327 (section 1325's predecessor) was based on prior I.C. § 30-1-81(j)(1), with the usual stylistic changes. The changes made it clearer that the special unfavorable treatment of after-acquired shares is voluntary with the corporation and applicable to those who acquired the shares on the date of the announcement as well as thereafter.

As amended in 2004 section 1325 provides that all shareholders who failed to certify that they acquired shares before the date specified in the appraisal notice and form are deemed to hold after-acquired shares, rather than just those shareholders who actually acquired shares after that date, as provided in prior I.C. § 30-1-1327. Amended section 1325(2) requires that if the corporation elects to treat one noncertifying shareholder as holding after-acquired shares, all shareholders who failed to make the required certification are to be treated as holders of after-acquired shares. The specification of the notice required in section 1325(2) was new in 2004, as were the time limits set for payment under subsections (3) and (4).

30-1-1326. Procedure if shareholder dissatisfied with payment or offer. — (1) A shareholder paid pursuant to section 30-1-1324, Idaho Code, who is dissatisfied with the amount of the payment must notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus interest, less any payment under section 30-1-1324, Idaho Code. A shareholder offered payment under section 30-1-1325, Idaho Code, who is dissatisfied with that offer must reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest.

(2) A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus interest under subsection (1) of this section within thirty (30) days after receiving the corporation's payment or offer of payment under section 30-1-1324 or 30-1-1325, Idaho Code, respectively, waives the right to demand payment under this section and shall be entitled only to the payment made or offered pursuant to those respective sections.

History.

I.C., § 30-1-1328, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 66, p. 907.

STATUTORY NOTES

Prior Laws.

Former § 30-1-1326, as added by S.L. 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 64.

Compiler's Notes.

This section was formerly compiled as § 30-1-1328.

ABA OFFICIAL COMMENT

A shareholder who is not content with the corporation's remittance under section 1324, or offer of remittance under section 1325, and wishes to pursue appraisal rights further must state in writing the amount the shareholder is willing to accept. A share-holder whose demand is deemed arbitrary, unreasonable or not in good faith, however, runs the risk of being assessed litigation expenses under section 1331. These provisions are designed to encourage settlement without a judicial proceeding.

A shareholder to whom the corporation has made payment (or who has been offered payment under section 1325) must make a supplemental demand within 30 days after receipt of the payment or offer of payment in order to permit the corporation to make an early decision on initiating appraisal proceedings. A failure to make such demand causes the shareholder to relinquish under section 1326(2) anything beyond the amount the corporation paid or offered to pay.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1328 was based on prior I.C. §§ 30-1-81(g) and (j)(2), with of course stylistic changes. "Technical" changes were made in subsection (1) to assure its applicability upon either the failure to make payment if the action was taken or the failure to return the shares if the action was not taken.

After the 2004 amendments, since the appraisal notice and form are now required by section 1322, as amended, provisions in former section 1328 relating to procedures to be followed if the corporation did not take the corporate action giving rise to appraisal rights were deleted from amended section 1326.

30-1-1327. [Amended and Redesignated.]

STATUTORY NOTES

Compiler's Notes.

Former § 30-1-1327 was amended and redesignated as § 30-1-1325 by S.L. 2004, ch. 324, § 65.

30-1-1328. [Amended and Redesignated.]

STATUTORY NOTES

Compiler's Notes.

Former § 30-1-1328 was amended and redesignated as § 30-1-1326 by S.L. 2004, ch. 324, § 66.

30-1-1329. [Reserved.]

30-1-1330. Court action. — (1) If a shareholder makes demand for payment under section 30-1-1326, Idaho Code, which remains unsettled, the corporation shall commence a proceeding within sixty (60) days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not

commence the proceeding within the sixty-day period, it shall pay in cash to each shareholder the amount demanded pursuant to section 30-1-1326, Idaho Code, plus interest.

(2) The corporation shall commence the proceeding in the appropriate court of the county where the corporation's principal office is located, or, if none in this state, Ada county. If the corporation is a foreign corporation, it shall commence the proceeding in the county in this state where the principal office of the domestic corporation merged with the foreign corporation was located or, if the domestic corporation did not have its principal office in this state at the time of the transaction, in Ada county.

(3) The corporation shall make all shareholders, whether or not residents of this state, whose demands remain unsettled parties to the proceeding, as in an action against their shares, and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(4) The jurisdiction of the court in which the proceeding is commenced under subsection (2) of this section is plenary and exclusive. The court may appoint one (1) or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them, or in any amendment to it. The shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.

(5) Each shareholder made a party to the proceeding is entitled to judgment:

(a) For the amount, if any, by which the court finds the fair value of the shareholder's shares, plus interest, exceeds the amount paid by the corporation to the shareholder for such shares; or

(b) For the fair value, plus interest, of the shareholder's shares for which the corporation elected to withhold payment under section 30-1-1325, Idaho Code.

History.

I.C., § 30-1-1330, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 67, p. 907; am. 2007, ch. 314, § 13, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, updated the last section reference in subsection (1); and in subsection (2), in the first sentence, substituted "where the corporation's principal office is located, or, if none in this state, Ada county" for "where the corporation's principal office, or, if none in this state, its registered office, is located," and in the last sentence, deleted "without a registered office in this state" following the first occurrence of "foreign corporation" and "or registered office" following "principal office," and inserted "or, if the domestic corporation did not have its principal office in this state" and "in Ada county."

ABA OFFICIAL COMMENT

Section 1330 retains the concept of judicial appraisal as the ultimate means of determining fair value. The proceeding is to be commenced by the corporation within 60 days after a timely demand for payment under section 1326 was received. If the proceeding is not commenced within this period, the corporation must pay the additional amounts demanded by the shareholders under section 1326. See the Official Comment to section 1326.

All demands for payment made under section 1326 are to be resolved in a single proceeding brought in the county in the state where the corporation's principal office is located or, if it is a foreign corporation, where its registered office is located, or if it has no registered office, where the principal office' of the corporation which issued the shares to be appraised was located. All shareholders making section 1326 demands must be made parties, with service by publication authorized if necessary. Appraisers may be appointed within the discretion of the court. Since the nature of the proceeding is similar to a proceeding in equity or for an accounting, section 1330(4) provides that there is no right to a jury trial. The final judgment establishes not only the fair value of the shares in the abstract but also determines how much each shareholder who made a section 1326 demand should actually receive.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1330 was based on prior I.C. § 30-1-81(h), with both the usual stylistic changes and at least one minor substantive change. A minor substantive revision was made with respect to the designated court in subsection (2). Under prior I.C. § 30-1-81(h)(2), the "appropriate" court was the district court in the county where the registered office is located. Under subsection (2), this was changed to the county of the principal office, unless there is none. We have seen similar changes throughout the Model Act in other sections involving judicial proceedings involving internal corporate affairs.

The 2004 amendments to section 1330 made several stylistic changes and one substantive revision: section 1330(4) clarifies that there is no right to a jury trial for reasons set forth in the Official Comment. Since 1978, the Model Act has provided that it is the responsibility of the corporation to commence the proceeding within 60 days after receiving one or more timely demands for additional payment and that failing to do so will result in unconditional liability for the amount demanded. Provisions analogous to sections 1330(2), (3), and (4), relating to venue, notice, and the plenary powers of the court, originated in the 1957 amendments to the Model Act.

30-1-1331. Court costs and counsel fees. — (1) The court in an appraisal proceeding commenced under section 30-1-1330, Idaho Code, shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the shareholders demanding appraisal, in amounts the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this part.

(2) The court in an appraisal proceeding may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the corporation and in favor of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements of section 30-1-1320, 30-1-1322, 30-1-1324 or 30-1-1325, Idaho Code; or

(b) Against either the corporation or a shareholder demanding appraisal, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this part.

(3) If the court in an appraisal proceeding finds that the services of counsel for any shareholder were of substantial benefit to other shareholders similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to such counsel reasonable fees to be paid out of the amounts awarded to shareholders who were benefited.

(4) To the extent the corporation fails to make a required payment pursuant to section 30-1-1324, 30-1-1325 or 30-1-1326, Idaho Code, the shareholder may sue directly for the amount owed and, to the extent successful, shall be entitled to recover from the corporation all costs and expenses of the suit, including counsel fees.

History.

I.C., § 30-1-1331, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 68, p. 907.

JUDICIAL DECISIONS

Non-Shareholder.

Trial court was not entitled to award the shareholder costs and attorney fees because the shareholder was not entitled to vote on the sale of assets; because he was not entitled to vote, he did not have rights as a dissenting shareholder and was not the prevailing party in the case. Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

ABA OFFICIAL COMMENT

Section 1331(1) provides a general rule that the costs of the appraisal proceeding should be assessed against the corporation. Nevertheless, the court is authorized to assess these costs, in whole or in part, against all or some of the shareholders demanding appraisal if it concludes they acted arbitrarily, vexatiously, or not in good faith regarding the rights provided by this part. Similarly, under section 1331(2), the court may assess fees and expenses of counsel and experts against the corporation or against all or some of the shareholders demanding appraisal for the reasons stated in this subsection. Under section 1331(3), if the corporation is not required to pay the counsel fees for the shareholders demanding appraisal, the court may require all shareholders who benefited from the services of counsel to share in the payment of such fees. The purpose of all these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith under this part to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares.

While subsections (1)-(3) allocate costs and expenses in an appraisal proceeding, subsection (4) covers the situation where the corporation was obligated to make payment and did not meet this obligation. In that event, the shareholder may sue the corporation directly for the amount owed. In such an action, subsection (4) requires the court, to the extent the shareholder was successful, to impose all costs and expenses, including counsel fees, on the corporation.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1331 was based on our prior I.C. § 30-1-81 (i), with the usual stylistic revisions.

The 2004 amendments added subsection (4).

Part 14. Dissolution

30-1-1401. Dissolution by incorporators or initial directors. — A majority of the incorporators or initial directors of a corporation that has not issued shares or has not commenced business may dissolve the corporation by delivering to the secretary of state for filing articles of dissolution that set forth:

(1) The name of the corporation;

(2) The date of its incorporation;

(3) Either:

(a) That none of the corporation's shares has been issued, or

(b) That the corporation has not commenced business;

(4) That no debt of the corporation remains unpaid;

(5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and

(6) That a majority of the incorporators or initial directors authorized the dissolution.

History.

I.C., § 30-1-1401, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 1401 provides a simple method of voluntary dissolution for a corporation that has not issued shares or commenced business. These provisions are alternative: a corporation may utilize section 1401 if it has not issued shares (even though it has commenced business) or if it has issued shares but has not commenced business. Dissolution may be accomplished in either of these situations simply by a majority vote of the incorporators or initial directors. (See section 205 and its Official Comment for a discussion of the roles of "incorporators" or "initial directors" in the organization of a corporation.)

This simple method of dissolution is likely to be used by name-holding corporations or by corporations formed for the initiation of a new venture when the reasons for the initial creation of the corporation have been completely realized or will never come to fruition.

The form of articles of dissolution provided in section 1401 takes account of the fact that a corporation may utilize this section even though it has received capital from the issuance of shares or has incurred liabilities either from the commencement of business without issuing shares or from its organization; hence the articles must state that no debts remain unpaid, and that the net assets of the corporation remaining after winding up have been distributed to the shareholders.

IDAHO REPORTER'S COMMENT

The only arguably substantive change here is that, whereas prior I.C. § 30-1-82 permitted voluntary dissolution by incorporators or initial directors only if the corporation has not commenced business and not issued shares, new Model Act § 1401 substitutes the disjunctive "or." This minor change is designed to increase the usefulness and simplicity of this method of voluntary dissolution. In addition, conforming changes are made in the description of the articles of dissolution.

Non-substantive changes include stylistic changes in all parts of the section and movement of the prior I.C. § 30-1-82(b) filing details to the centralized provisions of part 1.

30-1-1402. Dissolution by board of directors and shareholders. — (1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be adopted:

(a) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflicts of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting. The notice must also state

that the purpose, or one (1) of the purposes, of the meeting is to consider dissolving the corporation.

(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote, a greater number of shares to be present, or a vote by voting groups, adoption of the proposal to dissolve shall require the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast exists.

History.

I.C., § 30-1-1402, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 69, p. 907.

ABA OFFICIAL COMMENT

Section 1402(2) requires the board of directors, after approving a proposal to dissolve, to submit the proposal to the shareholders for their approval. When submitting the proposal the board of directors must make a recommendation to the shareholders that the plan be approved, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation. For example, the board or directors may make such a determination where there is not a sufficient number of directors free of a conflicting interest to approve the proposal or because the board of directors is evenly divided as to the merits of the proposal but is able to agree that shareholders should be permitted to consider dissolution. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances, and communicate the basis for the determination, when submitting the proposal to dissolve to the shareholders. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, shareholders should not be asked to act on a proposal for dissolution in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the proposed dissolution and the interests of shareholders.

Section 1402(3) permits the board of directors to condition its submission of a proposal for dissolution on any basis. Among the conditions that a board might impose are that the proposal will not be deemed approved unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders. The board of directors is not limited to conditions of these types.

Section 1402(4) provides that if the proposal is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the proposal is to be submitted. Requirements concerning the timing and content of a notice of meeting are set out in section 705. Section 1402(4) does not itself require that notice be given to nonvoting shareholders where the proposal is approved, without a meeting, by unanimous consent. However, that requirement is imposed by section 704(4).

Section 1402(5) provides that approval of a proposal for dissolution requires approval of the shareholders at a meeting at which a quorum consisting of a majority of the votes entitled to be cast on the proposal exists. If a quorum is present, then under sections 725 and 726 the proposal will be approved if more votes are cast in favor of the proposal than against it by the voting group or separate voting groups entitled to vote on the proposal. This represents a change from the Act's previous voting rule for dissolution, which required approval by a majority of outstanding shares.

The Act does not mandate separate voting by voting groups or appraisal rights in relation to dissolution proposals on the theory that, upon dissolution, the rights or all classes or series of shares are fixed by the articles of incorporation. Of course, group voting rights may be conferred by the articles of incorporation or by the board of directors, acting pursuant to subsection (3).

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, the biggest substantive change here seemed to be the deletion of the provision in prior I.C. § 30-1-83 [from the prior (1969) Model Act] for voluntary dissolution by written consent of all the shareholders. Your reporter found no explanation for

this deletion in the Annotated ABA Official Materials (Prentice Hall 4-volume loose-leafs). The purpose of prior I.C. § 30-1-83 was to eliminate the need for holding shareholders' and directors' meetings when all shareholders agree that dissolution is proper and all shareholders, or their duly authorized attorneys, are available to sign the written consent. The 1997 revisers did not consider this purpose sufficient to justify deviation from the model scheme for voluntary dissolution, especially in light of the ABA OFFICIAL COMMENT to section 704 on "[a]ction without meeting" which provides that "[s]ection 704 is applicable to any shareholder action, including...dissolution."

Substantive changes from prior § 30-1-84 appear in Model Act § 1402 subsections (2), (3) and (4).

Subsection (2), requiring the board of directors to make a recommendation on the proposal to dissolve, or to state the basis for its decision that it should make no recommendation, conforms the requirements with respect to dissolution to those applicable to article amendments and other extraordinary changes. Old § 84(a) required only that directors adopt "a resolution recommending that the corporation be dissolved."

Subsection (3), authorizing the board to condition its submission to the shareholders on any basis, codifies a practically important concept. Comments to earlier sections above have previously discussed the similar provisions made applicable to amendments and other extraordinary changes.

Subsection (4) requires that notice be given to nonvoting as well as to voting shareholders, again conforming the dissolution procedures to the procedures previously discussed with respect to amendments and other extraordinary changes. Old § 84(b) required notice only to voting shareholders.

Subsection (5) was amended in 2004 to adopt for dissolutions the uniform rule now applicable to all fundamental changes provisions.

30-1-1403. Articles of dissolution. — (1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing articles of dissolution setting forth:

(a) The name of the corporation;

(b) The date dissolution was authorized; and

(c) If dissolution was approved by the shareholders, a statement that the proposal to dissolve was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation.

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

(3) For purposes of this part, "dissolved corporation" means a corporation whose articles of dissolution have become effective and includes a successor entity to which the remaining assets of the corporation are transferred subject to its liabilities for purposes of liquidation.

History.

I.C., § 30-1-1403, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 70, p. 907.

ABA OFFICIAL COMMENT

The act of filing the articles of dissolution makes the decision to dissolve a matter of public record and establishes the time when the corporation must begin the process of winding up and cease carrying on its business except to the extent necessary for winding up. If dissolution was approved by the shareholders, the articles of dissolution must state that dissolution was duly approved by the shareholders in the manner required by the Act and the articles of incorporation of the corporation.

Under the Model Act, articles of dissolution may be filed at the commencement of winding up or at any time thereafter. This is the only filing required for voluntary dissolution; no filing is required to mark the completion of winding up since the existence of the corporation continues for certain purposes even after the business is wound up and the assets remaining after satisfaction of all creditors are distributed to the shareholders. No time limit for filing the articles is specified, and it often may be desirable to postpone filing until winding up is far along or even complete.

A corporation is dissolved on the date the articles of dissolution are effective. After this date the corporation is referred to as a "dissolved corporation," although its existence continues under section 1405 for purposes of winding up.

Subsection (3) defines "dissolved corporation" for purposes of sections 1401 through 1409 to include successor entities to which assets are transferred subject to liabilities for purposes of liquidation. This provision covers the situation where a liquidating trust or other successor entity is used to complete the liquidation.

IDAHO REPORTER'S COMMENT

When enacted in Idaho in 1997, Model Act § 1403 substituted a one-step filing procedure for the two-step procedure required by prior I.C. §§ 30-1-87, 92 and 93. Under the old act, a dissolving corporation, upon approval of the plan of dissolution, first mailed notice of its prospective dissolution "to each of its known actual or known potential creditors not less than thirty (30) days prior to filing articles of dissolution" [old § 87(a)] and later executed [old § 92] and filed [old § 93] articles of dissolution when the winding-up process was completed. The prior (1969) Model Act contained an even more complex two-step procedure than the Idaho version just described. The 1969 Model Act provided for an intermediate filing of a "statement of intent to dissolve" with the secretary of state. The experience in many states with this two-step procedure was that it was unnecessarily complex, and as a result a one-step procedure has been widely implemented. All of our six immediately neighboring states generally follow the one-step procedure of the Model Act.

The many states that have elected a one-step filing procedure are divided on whether the filing should mark the beginning or end of the dissolution process. Section 1403 opts basically for the beginning but provides that the filing may be deferred — "At any time after dissolution is authorized..." As a result, "articles of dissolution" under § 1403 become largely analogous to the "statement of intent to dissolve" in earlier versions of the Model Act. The list of items required in the articles therefore differs from that in prior § 92. Section 1403(2) was new in 1997 and designed to definitely establish when a corporation is "dissolved" or takes on the status of a "dissolved corporation" for purposes of other sections of the Model Act. As usual, stylistic changes were also made throughout this section.

With respect to prior § 93, as we've seen throughout, special filing provisions were deleted in the substantive parts and centralized in part 1.

In 2004 two changes were made in section 1403. First, subsection (l)(c) was amended and subsection (1)(d) deleted, both to conform with similar changes relating to the manner of recording shareholder votes in other filing requirement sections of the Model Act.

Second, a new subsection (3) defines "dissolved corporation." As the Official Comment notes, this codifies the common reality of using a liquidation trust or other successor entity to wind up the liquidation.

30-1-1404. Revocation of dissolution. — (1) A corporation may revoke its dissolution within one hundred twenty (120) days of its effective date.

(2) Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(3) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(a) The name of the corporation;

(b) The effective date of the dissolution that was revoked;

(c) The date that the revocation of dissolution was authorized;

(d) If the corporation's board of directors or incorporators revoked the dissolution, a statement to that effect;

(e) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(f) If shareholder action was required to revoke the dissolution, the information required by section 30-1-1403(1)(c), Idaho Code.

(4) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(5) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred.

History.
I.C., § 30-1-1404, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 71, p. 907.

ABA OFFICIAL COMMENT

Voluntary dissolution may be revoked within 120 days of the effective date of the dissolution. Because of the importance and finality of dissolution, the decision to revoke dissolution generally requires shareholder authorization (unless the dissolution was approved solely by the initial directors or incorporators under section 1401). Section 1404(2), however, contemplates that the board of directors may revoke dissolution if it is granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Certain other action requiring shareholder approval may be revoked by the board of directors without express shareholder approval. (See sections 1103 and 1202). By contrast, dissolution under section 1404 may not be revoked by the board of directors without approval of the shareholders.

Articles of revocation of dissolution must be filed to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original articles of dissolution.

The effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

IDAHO REPORTER'S COMMENT

The changes here relate to going from the old two-step notice and filing procedure to a one-step filing procedure. Because our prior Idaho procedure provided a filing to mark the end of the winding-up process [old I.C. §§ 30-1-92 & 93] as well as notice at the beginning [old § 87], it was feasible to allow, as old § 88 and earlier Model Acts did, revocation of dissolution at any time before the final articles of dissolution were filed. In a one-step procedure like that under the new Model Act, on the other hand, involving a single filing at or near the beginning of the winding-up process, it seems particularly appropriate to impose a time limitation on the power to revoke dissolution. Section 1404(1) imposes a limitation of 120 days from the effective date of the articles of dissolution.

The actual procedure for revocation of dissolution is greatly formalized and detailed in Model Act § 1404 as compared to that in old § 88. Under § 1404(2) revocation must generally be authorized in the same manner as the original dissolution was authorized, but the power to revoke may be delegated to the board acting alone by express authorization of the shareholders when they authorize the original dissolution. This subsection (2) provision should be contrasted with old § 88 which generally limited revocation to unanimous shareholder action or to directorial proposal followed by majority shareholder approval. Old § 88 did not contemplate delegation of revocation to the board.

Subsections (4) and (5) speak to matters not addressed in old § 88.

30-1-1405. Effect of dissolution. — (1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will not be distributed in kind to its shareholders;

(c) Discharging or making provision for discharging its liabilities;
(d) Distributing its remaining property among its shareholders according to their interests; and
(e) Doing every other act necessary to wind up and liquidate its business and affairs.
(2) Dissolution of a corporation does not:
(a) Transfer title to the corporation's property;
(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
(c) Subject its directors or officers to standards of conduct different from those prescribed in part 8 of this chapter;
(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;
(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;
(f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
(g) Terminate the authority of the registered agent of the corporation.

History.
I.C., § 30-1-1405, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Analysis

Assets.
Bankruptcy debtors improperly scheduled assets of a dissolved corporation of which the debtors were the sole shareholders as assets of the debtors, since the assets remained property of the corporation after dissolution which could only be used to satisfy the debts of the corporation and, until satisfaction of such debts, title to the assets did not pass to the debtors as shareholders of the corporation. In re Young, 409 B.R. 508 (Bankr. D. Idaho 2009).

Despite language in the bankruptcy petition and other filings which appeared to state that the debtors' personal bankruptcy included the debts of the corporation they had owned and for which they had just filed dissolution papers, the bankruptcy was personal only. The assets of the corporation remained with the corporation during the winding up period, and were not immediately transferred to debtors. In re Burch, — Bankr. —, 2013 Bankr. LEXIS 897 (Bankr. D. Idaho Mar. 11, 2013).

Piercing the Corporate Veil.
Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

ABA OFFICIAL COMMENT

Section 1405(1) provides that dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and

liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.

The Model Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. This is made clear by section 1405(2), which provides that part 14 dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. Section 1405(2) expressly reverses all of these common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way.

IDAHO REPORTER'S COMMENT

New Model Act 1405(1), describing the winding-up procedure to be followed by a corporation after filing articles of dissolution, is derived from the sections of the prior (1969) Model Act describing procedures to be followed after the filing of the notice of intent to dissolve. As discussed above in the Idaho reporter's comment to § 1403, Idaho never adopted these sections but instead provided for notice to creditors in prior I.C. § 30-1-87.

Subsection (2) is new and is based on N.Y. Bus. Corp. Law § 1006, with stylistic changes. Subsection (2)(g) was added to clarify the status of the registered agent following the filing of articles of dissolution. There is no requirement that a registered office or registered agent be maintained following dissolution, but the authority of a registered agent is not changed by the act of filing articles of dissolution.

30-1-1406. Known claims against dissolved corporation. — (1) A dissolved corporation may dispose of the known claims against it by notifying its known claimants in writing of the dissolution at any time after its effective date.

(2) The written notice must:

(a) Describe information that must be included in a claim;

(b) Provide a mailing address where a claim may be sent;

(c) State the deadline, which may not be fewer than one hundred twenty (120) days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(d) State that the claim will be barred if not received by the deadline.

(3) A claim against the dissolved corporation is barred:

(a) If a claimant who was given written notice under subsection (2) of this section does not deliver the claim to the dissolved corporation by the deadline; or

(b) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within ninety (90) days from the effective date of the rejection notice.

(4) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

History.

I.C., § 30-1-1406, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 72, p. 907.

ABA OFFICIAL COMMENT

Sections 1406 and 1407 provide a new and simplified system for handling known and unknown claims against a dissolved corporation, including claims based on events that occur after the dissolution of the corporation. Section 1406 deals solely with known claims while

section 1407 deals with unknown or subsequently arising claims. A claim is a "known" claim even if it is unliquidated (see section 1406(4)); a claim that is contingent or has not matured so that there is no immediate right to bring suit is not a "known" claim. Known claims are handled in section 1406 through a process of written notice to claimants; the written notice must contain the information described in section 1406(2). Section 1406(3) then provides fixed deadlines by which claims are barred under various circumstances, as follows:

(1) If a claimant receives written notice satisfying section 1406(2) but fails to file the claim by the deadline specified by the corporation, the claim is barred by section 1406(3)(a).

(2) If a claimant receives written notice satisfying section 1406(2) and files the claim as required:

(i) but the corporation rejects the claim, the claimant must commence a proceeding to enforce the claim within 90 days of the rejection or the claim is barred by section 1406(3)(b); or

(ii) if the corporation does not act on the claim or fails to notify the claimant of the rejection, the claimant is not barred by section 1406(3) until the corporation notifies the claimant.

(3) If the corporation publishes notice under section 1407, a claimant who was not notified in writing is barred unless he commences a proceeding within five years after publication of the notice.

(4) If the corporation does not publish notice, a claimant who was not notified in writing is not barred by section 1406(3) from pursuing his claim.

These principles, it should be emphasized, do not lengthen statutes of limitation applicable under general state law. Thus claims that are not barred under the foregoing rules — for example, if the corporation does not act on a claim — will nevertheless be subject to the general statute of limitations applicable to claims of that type.

Even though the directors are not trustees of the assets of a dissolved corporation (see section 1405(2)(c)), they must discharge or make provision for discharging all of the corporation's known liabilities before distributing the remaining assets to the shareholders. See sections 1405(1)(c) and (d). See also sections 640 and 833.

IDAHO REPORTER'S COMMENT

Model Act §§ 1406 and 1407 provide a new comprehensive treatment for known and unknown claims against a dissolved corporation.

Section 1406 deals with known claims that will normally be presented during the winding-up process and discharged (or allowance therefore made) before final distributions are made to shareholders. The biggest substantive change here again relates to going from a "two-step" to a "one-step" filing procedure. (See the Idaho reporter's comment to § 1403, above.) Under our prior "first step" [old I.C. § 30-1-87(a)] notice to known creditors was given after adoption of the resolution to dissolve and "not less than thirty (30) days prior to filing articles of dissolution." Under the new Model Act's "one-step" filing procedure, section 1406(2) provides for notice to known claimants "at any time after" effective filing of the articles of dissolution.

Section 1406(3), relating to the barring of claims for failure to make timely presentation, had no equivalent in the prior Idaho act. Cf. the two-year provision in old I.C. § 30-1-105.

30-1-1407. Other claims against dissolved corporation. — (1) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice.

(2) The notice must:

(a) Be published one (1) time in a newspaper of general circulation in the county where the dissolved corporation's principal office is or was located or, if none in this state, in Ada county;

(b) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(c) State that a claim against the dissolved corporation will be barred unless a proceeding to enforce the claim is commenced within two (2) years after the publication of the notice.

(3) If the dissolved corporation publishes a newspaper notice in accordance with subsection (2) of this section, the claim of each of the following

claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two (2) years after the publication date of the newspaper notice:

(a) A claimant who was not given written notice under section 30-1-1406, Idaho Code;

(b) A claimant whose claim was timely sent to the dissolved corporation but not acted on;

(c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) A claim that is not barred by section 30-1-1406(3) or 30-1-1407(3), Idaho Code, may be enforced:

(a) Against the dissolved corporation, to the extent of its undistributed assets; or

(b) Except as provided in section 30-1-1408(4), Idaho Code, if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to the shareholder.

History.

I.C., § 30-1-1407, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 73, p. 907; am. 2007, ch. 314, § 14, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation's principal office is or was located or, if none in this state, in Ada county" for "corporation's principal office or, if none in this state, its registered office is or was last located" in subsection (2)(a).

ABA OFFICIAL COMMENT

Earlier versions of the Model Act did not recognize the serious problem created by possible claims that might arise long after the dissolution process was completed and the corporate assets distributed to shareholders. Most of these claims were based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution, but they also involved negligence for which the statute of limitations did not begin to run until the negligence was discovered (e.g., a surgical instrument left inside the patient). The application of the Model Act provision (and of the state dissolution statutes phrased in different terms) to this problem led to confusing and inconsistent results. See generally Friedlander and Gilber, "*Post Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations*," 31 Vand. L. Rev. 1363 (1978). The problems raised by this type of litigation are intractable: on the one hand, the application of a mechanical two-year limitation period to a claim for injury that occurs after the period has expired involves obvious injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provision for creditors, and distribute the balance of the corporate assets to the shareholders.

In some circumstances a tort law concept of transferee liability, sometimes characterized as "de facto merger," has been applied to allow plaintiffs incurring post dissolution injuries to bring suit against the person that acquired the corporate assets. See the Official Comment to section 1101. Some courts have refused to apply this doctrine, particularly when the purchaser of the corporate assets has not continued the business of the dissolved corporation. In these cases, the remedy of the plaintiff is limited to claims against the dissolved corporation and its shareholders receiving assets pursuant to the dissolution.

The solution adopted in ABA Official Text section 1407 is to continue the liability of a

dissolved corporation for subsequent claims for a period of five years [NOTE: two (2) years in new I.C. § 30-1-1407] after it publishes notice of dissolution. It is recognized that a five year cut-off is itself arbitrary, but it is believed that the great bulk of post dissolution claims will arise during this period. This provision is therefore believed to be a reasonable compromise between the competing considerations of providing a remedy to injured plaintiffs and providing a period of repose after which dissolved corporations may distribute remaining assets free of all claims and shareholders may receive them secure in the knowledge that they may not be reclaimed.

Directors must generally discharge or make provision for discharging all of the corporation's liabilities before distributing the remaining assets to the shareholders. See the Official Comment to section 1406. But section 1407 does not contemplate that liquidating distributions to shareholders will be deferred until all possible claims are barred under section 1407. Many claims covered by this section are of a type for which provision may be made by the purchase of insurance or by the setting aside of a portion of the assets, thereby permitting prompt distributions in liquidation. Claimants, of course, may always have recourse to the remaining assets of the dissolved corporation. See section 1407(4)(a). Further, where unexpected claims arise after distributions have been made to shareholders in liquidation, section 1407(4)(b) authorizes recovery against the shareholders receiving the earlier distributions. The recovery, however, is limited to the smaller of the recipient shareholders' pro rata share of the claim or the total amount of assets received as liquidating distributions by the shareholder from the corporation. The provision ensures that claimants seeking to recover distributions from shareholders will try to recover from the entire class of shareholders rather than concentrating only on the larger shareholders and protects the limited liability of shareholders.

IDAHO REPORTER'S COMMENT

The biggest difference here seems to be between the two-year post-dissolution limit on commencing proceedings under prior I.C. § 30-1-105 and the five-year limit under Official Text Model Act § 1407(3). Several courts and commentators have recognized that it is doubtful that Idaho (and 1969 Model Act) § 105 was designed to reach claims arising after dissolution, and indeed, often more than two years after dissolution. Nevertheless, some courts applied the two-year bar rigidly. Thus, the ABA Committee drafted § 1407 as a new section separately treating post-dissolution claims in a comprehensive manner.

Of our immediate neighbors, Nevada and Washington also have two-year periods, Wyoming four, and Oregon and Utah five; Montana says nothing express about a time limit on survival of remedies.

The 1997 revisers decided to stick with Idaho's prior two-year limitations period and thus amended Official Text subsections (2)(c) and (3) accordingly.

30-1-1408. Court proceeding. — (1) A dissolved corporation that has published a notice under section 30-1-1407, Idaho Code, may file an application with the district court of the county where the dissolved corporation's principal office is located, or, if none in this state, Ada county, for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved corporation or that are based on an event occurring after the effective date of dissolution but that, based on the facts known to the dissolved corporation, are reasonably estimated to arise after the effective date of dissolution. Provision need not be made for any claim that is or is reasonably anticipated to be barred under section 30-1-1407(3), Idaho Code.

(2) Within ten (10) days after the filing of the application, notice of the proceeding shall be given by the dissolved corporation to each claimant holding a contingent claim whose contingent claim is shown on the records of the dissolved corporation.

(3) The court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section.

The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the dissolved corporation.

(4) Provision by the dissolved corporation for security in the amount and the form ordered by the court under subsection (1) of this section, shall satisfy the dissolved corporation's obligations with respect to claims that are contingent, have not been made known to the dissolved corporation or are based on an event occurring after the effective date of dissolution, and such claims may not be enforced against a shareholder who received assets in liquidation.

History.

I.C., § 30-1-1408, as added by 2004, ch. 324, § 74, p. 907; am. 2007, ch. 314, § 15, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsection (1), substituted "district court" for "appropriate court" and "corporation's principal office is located or, if none in this state, Ada county" for "corporation's principal office, or, if none in this state, its registered office is last located."

ABA OFFICIAL COMMENT

Section 1408 adds a provision to the Model Act allowing a dissolved corporation to initiate a proceeding to establish the provision that should be made for unknown or contingent claims before a distribution in liquidation is made to shareholders. Similar proceedings are authorized in several states to remove the risk of director and shareholder liability for inadequate provision for claims.

Section 1408(1) authorizes the proceeding and specifies that provision for unknown and contingent claims can only be for those claims that are estimated to arise after dissolution that are not expected to be barred by section 1407(4). The same analysis may be made by the board of directors under section 1409 if court proceedings are not used. As a result, estimates for unknown or contingent claims, such as product liability injury claims that might arise after dissolution, need only be made for those claims that the court determines are reasonably anticipated to be asserted within three years after dissolution. Such estimates might reasonably be based on the claims experience of the corporation prior to its dissolution.

If the dissolved corporation elects to initiate a proceeding, it must give notice of the proceeding within 10 days after filing the court application to each holder of a contingent claim whose claim is shown on the records of the corporation. Notice to holders of guarantees made by the corporation typically would be required under this subsection.

Subsection (3) allows the court to appoint a guardian ad litem for unknown claimants, but does not make the appointment mandatory. Reasonable fees and expenses of the guardian ad litem are to be paid by the dissolved corporation. Section 1408 is designed to permit the court to adopt procedures appropriate to the circumstances.

If the proceeding is completed, section 1408(4) establishes that the dissolved corporation is deemed to have satisfied its obligation to discharge or make provision for discharging its liabilities (see section 1405(1)(c)). With respect to claims that have not matured, directors are protected from liability by section 1409(2), and shareholders are protected from claims under section 1408(4).

If a court determines that the corporation is dissolving for the primary purpose of avoiding anticipated claims of future tort claimants, it is expected that the court will use its general discretionary powers and deny the protections of section 1408 to the dissolved corporation.

IDAHO REPORTER'S COMMENT

Several states authorize similar court actions to remove the risks of director and shareholder liability for inadequate provision for certain claims. As of 2004 only Iowa, Maine and Mississippi had adopted section 1408 verbatim. Delaware is among at least four states with statutes similar to this Model Act innovation which provide that a corporation may petition the court to determine the amount and form of security that will be reasonably likely to be

sufficient to provide compensation for "claims" that are uncertain or unknown. These statutes also allow the court to appoint a guardian ad litem to represent any unknown claimants.

Providing specific statutory authority for such an equitable, final "winding up" seems like a constructive idea, a "good thing," so to speak.

30-1-1409. Director duties. — (1) Directors shall cause the dissolved corporation to discharge or make reasonable provision for the payment of claims and make distributions of assets to shareholders after payment or provision for claims.

(2) Directors of a dissolved corporation which has been disposed of claims under section 30-1-1406, 30-1-1407 or 30-1-1408, Idaho Code, shall not be liable for breach of subsection (1) of this section, with respect to claims against the dissolved corporation that are barred or satisfied under section 30-1-1406, 30-1-1407 or 30-1-1408, Idaho Code.

History.

I.C., § 30-1-1409, as added by 2004, ch. 324, § 75, p. 907.

JUDICIAL DECISIONS

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

ABA OFFICIAL COMMENT

New section 1409(1) establishes the duty of directors to discharge or make provision for claims and to make distributions of the remaining assets to shareholders. The earlier version of part 14 inferred the obligation from sections 1405(c) and (d) concerning the powers of the corporation to pay claims and make distributions upon dissolution. Liability of directors formerly was based on violations of section 640 concerning distributions. New section 640(8) removed distributions in liquidation from the coverage of section 640.

Section 1409(2) provides that directors of a dissolved corporation that complies with sections 1406, 1407, or 1408 are not liable for breach of section 1409(1) with respect to claims that are disposed of under those sections. For example, directors need not make provision for claims of known creditors who are barred under section 1406 for failure to file a claim or commence a proceeding within the specified times, for contingent claimants whose estimated claims are barred by the three-year period after publication, pursuant to section 1407(3), or for claimants such as guarantors if provision for the claims have been approved by a court under section 1408(4).

Section 1409(2) leaves unchanged the section 833 provision that director liability is to the corporation. There are, however, cases that under various theories recognize liability directly to creditors for wrongful payments in liquidation. While there might be circumstances under which direct creditor claims are appropriate, the basic approach of part 14 is that claims for breach of duty of directors for breach of section 1409(1) and claims against shareholders for recoupment of amounts improperly distributed in liquidation should be mediated through the corporation.

IDAHO REPORTER'S COMMENT

This new provision was added in 2004 to reflect that the possibility of director liability for unlawful distributions in liquidations is now covered in part 14 rather than under the general distribution provision, section 640.

30-1-1410 — 30-1-1419. [Reserved.]

30-1-1420. Grounds for administrative dissolution. — The secretary of state may administratively dissolve a corporation under section 30-1-1421, Idaho Code, if:

(1) The corporation does not deliver its annual report to the secretary of state by the date on which it is due;

(2) The corporation is without a registered agent in this state for sixty (60) days or more;

(3) The secretary of state has credible information that the corporation has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent has been changed or that its registered agent has resigned; or

(4) The corporation's period of duration stated in its articles of incorporation expires.

History.

I.C., § 30-1-1420, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 16, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsections (2) and (3), deleted "or registered office" following "registered agent"; and in subsection (3), deleted "or that its registered office has been discontinued" from the end.

ABA OFFICIAL COMMENT

Involuntary dissolution in earlier versions of the Model Act required judicial order upon suit filed by the state attorney general. In the comment to section 95 of the 1969 Model Act, this decision was explained on the basis that the Model Act "provides for judicial review in protection of rights that might otherwise be lost." This position, however, was not generally accepted — in 1982 only three jurisdictions limited involuntary dissolution to judicial action — with all other jurisdictions permitting administrative dissolution for a variety of reasons, usually including a failure to pay franchise taxes and often including failure to file annual reports or otherwise comply with similar requirements of the corporation statutes. Some of these administrative dissolution statutes appear in the tax statutes rather than the corporation statutes of the states.

The experience in most states has been that administrative dissolution, or the threat thereof, is an effective enforcement mechanism for a variety of statutory obligations. Judicial dissolution is inappropriate for many of these violations because of its cost and the diversion of limited legal resources, particularly since most violations reflect the abandonment of the corporation by its owners.

The advantages of administrative dissolution in these circumstances are compelling: it not only reduces the number of records maintained by the secretary of state, but also avoids further wasteful attempts to compel compliance by the abandoned corporations and returns the corporate name promptly to the status of available names. Therefore, the revised Model Act includes, in Official Text sections 1420 through 1423, a model provision for the administrative dissolution of corporations in certain limited circumstances. These circumstances are set forth in Official Text section 1420 and closely parallel provisions found in most state statutes on this subject.

IDAHO REPORTER'S COMMENT

Sections 1420 through 1423, relating to administrative dissolution, are new and have no analogue in earlier versions of the Model Act, which as per prior I.C. § 30-1-95 required a judicial proceeding initiated by the Attorney General to cause dissolution for the problems now listed in § 1420(2), (3) and (4). The cause in § 1420(1) was covered by old I.C. § 30-1-134 on

forfeitures. "Forfeiture," as such, disappears as a separate procedure and is in effect replaced by, or subsumed within, "administrative dissolution."

Taking the A.G. and the courts out of the loop seems like a great idea. Consolidating in one place what was separated in old I.C. §§ 30-1-95 and 134 also seems constructive.

The reference in Official Text § 1420 to "franchise taxes" was deleted. The 1997 revision also slightly changed the wording in subsections (1) and (3) from that in the Official Text in order to reflect ongoing practice by the Idaho secretary of state.

30-1-1421. Procedure for and effect of administrative dissolution. — (1) If the secretary of state determines that one (1) or more grounds exist under section 30-1-1420, Idaho Code, for dissolving a corporation, he shall give notice of his determination to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered agent.

(2) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty (60) days after receipt of the notice of determination, the secretary of state shall administratively dissolve the corporation by noting the fact of dissolution and the effective date thereof in his records. The secretary of state shall give notice of the dissolution to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered agent.

(3) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 30-1-1405, Idaho Code, and notify claimants under sections 30-1-1406 and 30-1-1407, Idaho Code.

(4) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

History.

I.C., § 30-1-1421, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 17, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, at the end of subsections (1) and (2), substituted "agent" for "office."

ABA OFFICIAL COMMENT

Many failures to comply with statutory requirements that may give rise to administrative dissolution under section 1420 occur because of oversight or inadvertence by responsible corporate officers of corporations that are continuing in business. Such failures are usually corrected promptly when brought to the corporation's attention. Sections 1421(1) and (2) therefore provide a mandatory notice by the secretary of state to each corporation subject to administrative dissolution and a 60-day grace period following the notice before the administrative dissolution may be accomplished by the secretary of state.

In most instances, the issue whether the corporation is subject to administrative dissolution will not be controverted. If a corporation is administratively dissolved, it may petition the secretary of state for reinstatement under section 1422 and, if this is denied, it may appeal to the courts under section 1423.

IDAHO REPORTER'S COMMENT

New Model Act § 1421 is greatly simplified as compared to the "roughly equivalent" prior I.C.

§§ 95, 134, 135 and 136. Again, getting the A.G. and the courts out of this process seems a very constructive improvement. The requirement of notice to the corporation in § 1421(1) is another improvement. Old § 95 provided for notice but § 134 did not.

The 1997 revision deviated from the Official Text here as follows: (1) In subsection (1) the 1997 revision substituted "notice to" the corporation for "service on" the corporation. (2) Likewise, in subsection (2) reference to "notice" is substituted for reference to "service" and other changes are made to conform to ongoing practices of the Idaho secretary of state.

30-1-1422. Reinstatement following administrative dissolution. — (1) A corporation administratively dissolved under section 30-1-1421, Idaho Code, may apply to the secretary of state for reinstatement within ten (10) years after the effective date of dissolution. The application must:

(a) Recite the name of the corporation at the time of its dissolution and the date of its incorporation;

(b) State that the corporation applies for reinstatement;

(c) State that the corporation's proposed name satisfies the requirements of section 30-1-401, Idaho Code; and

(d) Be accompanied by a current annual report, appointment of registered agent or articles of amendment to extend the corporate existence, as appropriate to the reason for administrative dissolution.

(2) If the secretary of state determines that the application contains the information required by subsection (1) of this section and that the information is correct, he shall cancel the dissolution and prepare a certificate of reinstatement that recites the fact and effective date of the reinstatement, file a copy thereof and return the original to the corporation.

(3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

History.

I.C., § 30-1-1422, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 325, § 1, p. 1095.

JUDICIAL DECISIONS

Retroactive Application.

Where there was no showing of legislative intent to apply new business corporation statute retroactively, the court refused to apply it to a case that was still pending at the time the new act became effective. Scona, Inc. v. Green Willow Trust, 133 Idaho 283, 985 P.2d 1145 (1999).

ABA OFFICIAL COMMENT

ABA Official Text section 1422 provides a two-year period [NOTE: ten (10) years under new I.C. § 30-1-1422(1)] during which a corporation may seek reinstatement following administrative dissolution. This section may apply when a corporation through inadvertence or a failure to maintain a registered agent fails to receive or respond to the predissolution notice of default required by section 1421. A corporation that is reinstated pursuant to this section resumes carrying on its business as before dissolution.

In order to be eligible for reinstatement, a corporation must comply with all statutory requirements at the time it seeks reinstatement. It must establish, for example, that all taxes have been paid [NOTE: not a requirement in Idaho] and that its name is available when it files the application for reinstatement.

IDAHO REPORTER'S COMMENT

The differences here appear to be that Idaho did not previously expressly limit the period for

reinstatement and did charge a penalty where forfeiture had been for failure to file a timely annual report.

The 1997 revisers slightly rewrote the Official Text version of § 1422 to conform with existing administrative practices in the office of Idaho's secretary of state.

30-1-1423. Appeal from denial of reinstatement. — (1) If the secretary of state denies a corporation's application for reinstatement following administrative dissolution, he shall give the corporation written notice by first class mail that explains the reason or reasons for denial.

(2) The corporation may appeal the denial of reinstatement to the fourth district court, Ada county, Idaho, within thirty (30) days after receipt of the notice of denial. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the secretary of state's notice of dissolution, the corporation's application for reinstatement, and the secretary of state's notice of denial.

(3) The court may summarily order the secretary of state to reinstate the dissolved corporation or may take other action the court considers appropriate.

(4) The court's final decision may be appealed as in other civil proceedings.

History.

I.C., § 30-1-1423, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 1423 provides for an appeal from a decision by the secretary of state denying a petition for reinstatement. The court with jurisdiction over an appeal should be specified, and states adopting this section of the Model Act should specify who has the burden of proof on appeal and the standard for judicial review. See the Official Comment to section 126.

IDAHO REPORTER'S COMMENT

This section addresses a possibility not contemplated by the previous Idaho act. Oregon, Utah and Wyoming have provisions comparable to this new Model Act § 1423. Without statutory specification, it would seem that the burden of proof would be on the corporation to show clear error, abuse of process or the like.

The 1997 revision modified the Official Text here to provide for notice to the corporation rather than service on the corporation.

30-1-1424 — 30-1-1429. [Reserved.]

30-1-1430. Grounds for judicial dissolution. — The Idaho district court designated in section 30-1-1431(1), Idaho Code, may dissolve a corporation:

(1) In a proceeding by the attorney general if it is established that:

(a) The corporation obtained its articles of incorporation through fraud; or

(b) The corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a shareholder if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irrepara-

ble injury to the corporation is threatened or being suffered because of the deadlock;

(b) The directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent, and irreparable injury to the corporation is threatened or being suffered by reason thereof; or

(c) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates to elect successors to directors whose terms have expired;

(3) In a proceeding by a creditor if it is established that:

(a) The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

(b) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

History.

I.C., § 30-1-1430, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

JUDICIAL DECISIONS

Irreparable Injury.

"Irreparable injury" in subsection (2) is any impossible to repair injury that results from illegality, oppression, or fraud to the corporation and which is neither remote nor speculative, or it is being suffered: a monetary loss can constitute irreparable injury to a corporation, if the money cannot be recovered. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

ABA OFFICIAL COMMENT

Section 1430 provides grounds for the judicial dissolution of corporations at the request of the state, a shareholder, a creditor, or a corporation which has commenced voluntary dissolution. This section states that a court "may" order dissolution if a ground for dissolution exists. Thus, there is discretion on the part of the court as to whether dissolution is appropriate even though grounds exist under the specific circumstances.

1. INVOLUNTARY DISSOLUTION BY STATE. Section 1430(1) preserves long standing and traditional provisions authorizing the state to seek to dissolve involuntarily a corporation by judicial decree. While this power has been exercised only rarely in recent years, this right of the state involves a policing action that provides a means by which the state may ensure compliance with, and nonabuse of, the fundamentals of corporate existence. Section 1430(1) limits the power of the state in this regard to grounds that are reasonably related to this objective.

The legality of proposed corporations or of proposed actions has sometimes been tested by the secretary of state's refusal to accept documents for filing. The role of the secretary of state in reviewing documents for filing has been restricted by the Model Act (see section 125 and its Official Comment). It is intended that suits under this section will replace those actions.

2. INVOLUNTARY DISSOLUTION BY SHAREHOLDERS. Section 1431(2) provides for involuntary dissolution at the suit of a shareholder under circumstances involving deadlock or significant abuse of power by controlling shareholders or directors.

a. Deadlock. Dissolution because of deadlock is available if there is a deadlock at the directors' level but only if (1) the shareholders are unable to break the deadlock and (2) either

"irreparable injury" to the corporation is being threatened or suffered or the business and affairs "can no longer be conducted to the advantage of" the shareholders. [NOTE: The language after the word "suffered" in the next preceding sentence was not included in new (1997) I.C. § 30-1-1430(2)(a).] This language closely follows the earlier versions of the Model Act except that the requirement of "irreparable injury" has been relaxed to some extent. Dissolution because of deadlock at the directors' level is not dependent on the lapse of time during which the deadlock continues.

Dissolution is also available because of deadlock at the shareholders' level if the shareholders are unable to elect directors over a two-year period. This remedy is particularly important in small or family-held corporations in which share ownership may be divided on a 50-50 basis or a super majority provision (including possibly a requirement of unanimity) may effectively prevent the election of any directors. Dissolution under section 1430(2)(c) is not dependent on irreparable injury or misconduct by the directors then in office; if injury or misconduct is present, a deadlocked shareholder may proceed under another clause of section 1430(2).

b. Abuse of power. A shareholder may sue for involuntary dissolution upon proof either that those in control of the corporation are acting illegally, oppressively, or fraudulently (section 1430(2)(b)) or that the corporate assets are being misapplied or wasted (section 1430(2)(d)). [NOTE: Subdivision (d) was not included in new (1997) I.C. § 30-1-1430(2).] The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances. The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.

3. DISSOLUTION BY CORPORATION. Creditors may obtain involuntary dissolution only when the corporation is insolvent and only in the limited circumstances set forth in section 1430(3). Typically, a proceeding under the federal Bankruptcy Act is an alternative in these situations.

4. DISSOLUTION BY CREDITORS. A corporation that has commenced voluntary dissolution may petition a court to supervise its dissolution. Such an action may be appropriate to permit the orderly liquidation of the corporate assets and to protect the corporation from a multitude of creditors' suits or suits by dissatisfied shareholders.

IDAHO REPORTER'S COMMENT

New Model Act § 1430, subsection (1), on a dissolution action by the Attorney General, is substantively identical to prior I.C. § 30-1-94(a) and (b). The failures in old I.C. § 94(c) and (d) are now grounds for administrative dissolution under new Model Act § 1420, above.

Official Text subsection (2), on a dissolution suit by a shareholder, would expand the grounds somewhat as compared to prior I.C. § 30-1-97(a). For example, the Official Text would add to the final clause of § 1430(2)(a), "or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally," language designed to allow immediate dissolution in some deadlocked situations where, under old I.C. § 97, dissolution was probably available, if at all, only if the court was persuaded that the deadlock threatened irreparable injury or after two years of deadlock under old I.C. § 97(a)(3). The 1997 revision deleted this additional Official Text language.

Official Text subsection (2)(b), providing a shareholder action for dissolution when "the directors . . . act in a manner that is illegal, oppressive or fraudulent," does not include the additional old I.C. § 97(a)(2) requirement "that irreparable injury to the corporation is being suffered or is threatened by reason thereof." This requirement was added in the 1979 revision out of concern that shareholders have other protective actions such as derivative or class action suits and that dissolution should not be ordered solely on a showing of improper conduct, but should require a further showing of irreparable injury. The 1997 revision retained this "irreparable injury" requirement in new subsection (2)(b).

Subsection (2)(c), providing an action for shareholder dissolution after two failed annual meetings, is substantively identical to prior § 97(a)(3).

Official Text subsection (2)(d), permitting shareholders to seek judicial dissolution when "corporate assets are being misapplied or wasted," is successor to a Model Act provision rejected in the 1979 revision on the theory that the shareholders had other adequate remedies and dissolution was too final a solution for such a problem. The 1997 revision again rejected this provision.

Subsection (3), giving creditors standing to petition for dissolution in certain circumstances, is substantively identical to prior I.C. § 30-1-97(b).

Subsection (4) permits a corporation in the process of voluntary dissolution to petition to shift to a court supervised dissolution and is substantively identical to prior I.C. § 30-1-97 (c).

Prior I.C. § 30-1-97 prescribed that these "[p]roceedings . . . shall be brought in the county in which the registered office or the principal office of the corporation is situated." New section 1430 simply cross-references section 1431 (1), next below.

30-1-1431. Procedure for judicial dissolution. — (1) Venue for a proceeding by the attorney general to dissolve a corporation lies in Ada county. Venue for a proceeding brought by any other party named in section 30-1-1430, Idaho Code, lies in the county where a corporation's principal office is or was located or, if none in this state, in Ada county.

(2) It is not necessary to make shareholders parties to the proceeding to dissolve a corporation unless relief is sought against them individually.

(3) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

(4) Within ten (10) days of the commencement of a proceeding under section 30-1-1430(2), Idaho Code, to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association, the corporation must send to all shareholders, other than the petitioner, a notice stating that the shareholders may be entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under section 30-1-1434, Idaho Code, and accompanied by a copy of section 30-1-1434, Idaho Code.

History.

I.C., § 30-1-1431, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 18, p. 887.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation's principal office is or was located or, if none in this state, in Ada county" for "corporation's principal office or, if none in this state, its registered office is or was last located" in subsection (1).

ABA OFFICIAL COMMENT

Section 1431 designates the attorney general as the officer to bring suits for involuntary dissolution by the state. The county or counties where these suits must be commenced should be specified; it typically is either the state capital or the county in which the corporation's principal office is located. See the Official Comment to section 126. Suits brought for judicial dissolution under other subdivisions of section 1430 must be brought where the corporation's principal office is located or, if not located in this state, where its registered office is or was last located. Subsection (4) specifies the contents of the notice required of corporations subject to the elective purchase procedures provided for in section 1434.

IDAHO REPORTER'S COMMENT

New Model Act § 1431 consolidates and simplifies procedural provisions relating to judicial dissolution from three different sections of the prior Idaho act. Provisions dealing with service of process (last sentence of prior I.C. § 30-1-96) are omitted because the general service of process provisions of part 5 are applicable. The venue provisions are changed to reflect that

involuntary dissolution suits should generally be brought in the county of the corporation's principal office, if any, in the state. Suits by the Attorney General are centralized in Ada County.

Subsection (4) is new, providing a purchase option to dissolution for non-petitioning shareholders to purchase petitioners' shares in lieu of going through with shareholder-petitioned dissolution proceedings under § 1430(2). The details for this procedure are laid out in full in new Model Act § 1434, below.

30-1-1432. Receivership or custodianship. — (1) A court in a judicial proceeding brought to dissolve a corporation may appoint one (1) or more receivers to wind up and liquidate, or one (1) or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all of its property wherever located.

(2) The court may appoint an individual or a domestic or foreign corporation, authorized to transact business in this state, as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(a) The receiver:

(i) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and

(ii) May sue and defend in his own name as receiver of the corporation in all courts of this state;

(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

(4) The court during a receivership, may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.

(5) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of the assets.

History.

I.C., § 30-1-1432, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 1432 preserves provisions from earlier versions of the Model Act authorizing the appointment of a receiver, and adds authority to appoint a custodian as an alternative, for a corporation in a judicial dissolution proceeding. In many states, general statutes or rules of court regulate the appointment of receivers or custodians and define their duties. Section 1432 is designed to supplement these general provisions and grant the court power to take the steps

it considers necessary to resolve the internal corporate problem or to effect liquidation of the corporation in an efficient manner.

IDAHO REPORTER'S COMMENT

Section 1432 is a consolidation of several sections of the prior Idaho and earlier Model Acts dealing with receivership in judicial dissolution procedures. Section 1432 broadens these provisions by authorizing custodianships as well as receiverships. Section 1432 is a rewrite designed to give wide discretion and flexibility to the court overseeing the proceedings to protect the corporate estate.

The new Model Act contains no provision comparable to prior Idaho § 30-1-101, providing for discontinuance of liquidation proceedings. Such discontinuance would seem to be within the inherent powers of the court.

30-1-1433. Decree of dissolution. — (1) If after a hearing the court determines that one (1) or more grounds for judicial dissolution described in section 30-1-1430, Idaho Code, exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state, who shall file it.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with section 30-1-1405, Idaho Code, and the notification of claimants in accordance with sections 30-1-1406 and 30-1-1407, Idaho Code.

History.

I.C., § 30-1-1433, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A court decree ordering that a corporation be dissolved involuntarily has the same legal effect as articles of dissolution. Section 1433 requires that the secretary of state receive and file a copy of the decree. Thereafter the corporation's business and affairs are to be wound up as provided in sections 1405, 1406, and 1407.

IDAHO REPORTER'S COMMENT

New Model Act § 1433 consolidates and simplifies the judicial winding-up procedures previously described in old I.C. sections 100 through 103. The most significant change is that, consistently with changes made elsewhere in this part, section 1433 provides for the issuance of a decree of dissolution following the establishment of grounds for dissolution and then for continuation of the corporate existence after judicial dissolution for purposes of winding-up. Under the previous Idaho scheme, the decree of dissolution was entered after completion of the winding-up.

30-1-1434. Election to purchase in lieu of dissolution. — (1) In a proceeding under section 30-1-1430(2), Idaho Code, to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association, the corporation may elect or, if it fails to elect, one (1) or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. In a proceeding under section 30-1-1430(2), Idaho Code, to dissolve a corporation that has shares listed on a national securities exchange or regularly traded

in a market maintained by one (1) or more members of a national or affiliated securities association, the corporation may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

(2) An election to purchase pursuant to this section may be filed with the court at any time within ninety (90) days after the filing of the petition under section 30-1-1430(2), Idaho Code, or at such later time as the court in its discretion may allow. If the election to purchase is filed by one (1) or more shareholders, the corporation shall, within ten (10) days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this section. Shareholders who wish to participate must file notice of their intention to join in the purchase no later than thirty (30) days after the effective date of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding and shall participate in the purchase in proportion to their ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs. After an election has been filed by the corporation or one (1) or more shareholders, the proceeding under section 30-1-1430(2), Idaho Code, may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.

(3) If, within sixty (60) days of the filing of the first election, the parties reach agreement as to the fair value and terms of purchase of the petitioner's shares, the court shall enter an order directing the purchase of petitioner's shares upon the terms and conditions agreed to by the parties.

(4) If the parties are unable to reach an agreement as provided for in subsection (3) of this section, the court, upon application of any party, shall stay the section 30-1-1430(2), Idaho Code, proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the petition under section 30-1-1430(2), Idaho Code, was filed or as of such other date as the court deems appropriate under the circumstances.

(5) Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional costs, fees, and expenses as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation of shares among them. In allocating petitioner's shares among holders of different classes of shares, the court should attempt to preserve the existing distribution of voting rights among holders of different classes insofar as practicable and may direct that holders of a specific class or classes shall not participate in the purchase.

Interest may be allowed at the rate and from the date determined by the court to be equitable, but if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed. If the court finds that the petitioning shareholder had probable grounds for relief under section 30-1-1430(2)(b), Idaho Code, it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him.

(6) Upon entry of an order under subsection (3) or (5) of this section, the court shall dismiss the petition to dissolve the corporation under section 30-1-1430, Idaho Code, and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded to him by the order of the court which shall be enforceable in the same manner as any other judgment.

(7) The purchase ordered pursuant to subsection (5) of this section shall be made within ten (10) days after the date the order becomes final unless before that time the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to sections 30-1-1402 and 30-1-1403, Idaho Code, which articles must then be adopted and filed within fifty (50) days thereafter. Upon filing of such articles of dissolution, the corporation shall be dissolved in accordance with the provisions of sections 30-1-1405 through 30-1-1407, Idaho Code, and the order entered pursuant to subsection (5) of this section shall no longer be of any force or effect, except that the court may award the petitioning shareholder reasonable fees and expenses in accordance with the provisions of the last sentence of subsection (5) of this section and the petitioner may continue to pursue any claims previously asserted on behalf of the corporation.

(8) Any payment by the corporation pursuant to an order under subsection (3) or (5) of this section, other than an award of fees and expenses pursuant to subsection (5) of this section, is subject to the provisions of section 30-1-640, Idaho Code.

History.

I.C., § 30-1-1434, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The proceeding for judicial dissolution has become an increasingly important remedy for minority shareholders of closely-held corporations who believe that the value of their investment is threatened by reason of circumstances or conduct described in section 1430(2). If the petitioning shareholder proves one or more grounds under section 1430(2), he is entitled to some form of relief but many courts have hesitated to award dissolution, the only form of relief explicitly provided, because of its adverse effects on shareholders, employees, and others who may have an interest in the continuation of the business.

Commentators have observed that it is rarely necessary to dissolve the corporation and liquidate its assets in order to provide relief: the rights of the petitioning shareholder are fully protected by liquidating only his interest and paying the fair value of his shares while permitting the remaining shareholders to continue the business. In fact, it appears that most dissolution proceedings result in a buyout of one or another of the disputants' shares either pursuant to a statutory buyout provision or a negotiated settlement. See generally Hetherington & Dooley, "*Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*," 63 Va. L. Rev. 1 (1977); Haynsworth, "*The Effectiveness of Involuntary Dissolution Suits As a Remedy for Close Corporation Dissension*," 35 Clev. St. L. Rev. 25 (1987). Accordingly, section 1434 affords an orderly procedure by which a dissolution

proceeding under section 1430(2) can be terminated upon payment of the fair value of the petitioner's shares.

1. AVAILABILITY. There are three prerequisites to filing an election to purchase under section 1434. First, a proceeding to dissolve the corporation under section 1430(2) must have been commenced. Second, the corporation must have no shares of any class listed on a national securities exchange or regularly traded over the counter. [NOTE: New I.C. § 1434(1) extends the buy-out election to publicly-held companies themselves but not to their non-petitioning shareholders.] Finally, the election may be made only by the corporation or by shareholders other than the shareholder who is seeking to dissolve the corporation under section 1430(2).

As a practical matter, the remedy of judicial dissolution under section 1430(2) is appropriate only for shareholders of closely-held firms who have no ready market for their shares. Shareholders of publicly-traded firms are protected by their right to sell out if they are dissatisfied with current management or they may seek traditional remedies for breach of fiduciary duty. In contrast, a resort to litigation may result in an irreparable breach of personal relationships among the shareholders of a closely-held firm, making it impossible for them to continue in business to their mutual advantage.

2. EFFECT OF FILING. The election to purchase is wholly voluntary, but it can be made as a matter of right within 90 days after the filing of the petition under section 1430(2). After 90 days, leave of court is required. Once an election is filed:

(i) The election is irrevocable and may not be set aside or modified (as to one or more parties) unless the court determines it is equitable to do so; and

(ii) The dissolution proceeding under section 1430(2) may not be discontinued or settled and the petitioning shareholder may not dispose of his shares without court approval.

These provisions are intended to reduce the risk that either the dissolution proceeding or the buyout election will be used for strategic purposes. For example, the Official Comment to section 1430 cautions courts to distinguish between dissolution petitions predicated on "genuine abuse" and those brought for other reasons. Section 1434 makes strategic use of section 1430(2) a high-risk proposition for the petitioning shareholder because his shares are, in effect, subject to a "call" for 90 days after commencement of the section 1430(2) proceeding. The petitioner becomes irrevocably committed to sell his shares pursuant to section 1434 once an election is filed and may not thereafter discontinue the dissolution proceeding or dispose of his shares outside of section 1434 without permission of the court, which is specifically directed to consider whether such action would be equitable from the standpoint of the corporation and the other shareholders.

By the same token, if the corporation or the other shareholders fail to elect to purchase the petitioner's shares within the first 90 days, they run the risk that the court will decline to accept a subsequent election and will, instead, allow the dissolution proceeding to go forward. Note also that the dissolution proceeding is not affected by the mere filing of an election; it will be stayed only upon application to the court to determine the fair value of the petitioner's shares after the expiration of the 60 day negotiating period provided for in section 1434(3).

Once an election is filed, it may be set aside or modified only for reasons that the court finds equitable. If the court sets aside the election, the corporation or the electing shareholders are released from their obligation to purchase the petitioner's shares. Under section 1434(1), the court also has discretion to "modify" the election by releasing one or more electing shareholders without releasing the others.

3. ELECTION BY CORPORATION OR SHAREHOLDERS. Any change in the allocation of shareholdings in a closely-held corporation may upset control or other arrangements that have been previously negotiated by the parties. It is therefore desirable that the purchase of petitioner's shares under section 1434 be made in ways that are least disruptive of existing arrangements. Accordingly, an election by the corporation is given preference during the 90 day period provided for in section 1434(2). This preference does not affect the order of filing, and any shareholder may file an election (thus triggering the provisions of subsection (2)) as soon as the dissolution proceeding is commenced. If the corporation thereafter files an election within the 90 day period, its election takes precedence over any previously filed election by shareholders. An election by the corporation after 90 days may be filed only with the court's approval and would not be entitled to the same preemptive weight. Section 1434 does not affect an agreement between the corporation and the other shareholders to participate jointly in the purchase of the petitioner's shares.

Concern over preserving existing control arrangements makes it inadvisable to extend purchase rights to holders of shares that have only preferential rights to distributions or assets but do not have any right to vote (other than as provided by law). On the other hand, control arrangements are not disturbed if shareholders having voting rights elect to purchase nonvoting shares of a petitioning shareholder, and such elections are permitted. If the election to purchase is made by one or more shareholders, section 1434(2) requires the corporation to

notify all other shareholders of their right to join in the purchase "in proportion to their ownership of shares as of the date the first election was filed." This raises the question of whether shareholders of a class different from the class of shares owned by the petitioner may participate in the purchase. Given the wide variety of capital structures adopted by closely-held corporations, it is not possible to state a general rule that would be appropriate in all cases. Any allocation that is agreed to by the electing shareholders controls regardless of whether the other terms and conditions of the purchase are set by the parties' agreement pursuant to subsection (3) or are determined by the court pursuant to subsection (5). If electing shareholders cannot agree, the court, under subsection (5), must determine an allocation.

In making this determination, the court should be guided by the desirability of preserving existing arrangements, so far as that is practicable. Accordingly, holders of shares that carry lesser voting rights than the class owned by the petitioner ordinarily should not be permitted to participate pro rata in the purchase, whereas pro rata participation normally would be appropriate for those persons who own shares of a class having voting rights equivalent to those of the class owned by the petitioner. For example, suppose the corporation's articles provide for a five member board of directors, with three directors to be elected by Class A and two by Class B. The fact that the two classes have been given separate representation on the board of directors strongly suggests the existence of important differences in interest between them. If the petitioning shareholder owns Class B shares, an election to purchase may be filed by any holder of Class A or Class B under subsection (1), and under subsection (2) notice must be given to all other members of each class and any member of either class may file an election to join in the purchase. If no holder of Class B has elected to purchase, the petitioner's Class B shares should be allocated among the electing holders of Class A, in proportion to their holdings of Class A. If one or more holders of Class B has filed an election, however, the court should allocate all of the petitioner's shares to the electing Class B holders unless the parties otherwise agree.

Ordinarily, there is no reason to prohibit interclass purchases where the classes differ only in their economic attributes and voting control is not in issue. Accordingly, the court should permit common shareholders to participate in the purchase of the petitioner's nonvoting preferred shares unless the economic attributes of the preferred are clearly material to some other arrangement that has been worked out among the parties. This would be the case, for example, where the preferred is held by members of a family group and has dissolution rights providing for the distribution of unique assets such as real estate. In that case, it would be inappropriate to permit common shareholders to participate in the purchase of petitioner's preferred stock even though voting control of the corporation would not be affected.

4. COURT ORDER.

a. Voluntary agreement. All shareholders who file an election are joined as parties pursuant to subsection (2). If the parties come to terms within the 60 day negotiating period provided for in subsection (3), their agreement will be incorporated in an order of the court and will thereafter be enforceable as such.

b. Terms set by court. If the parties are unable to reach agreement, any or all terms of the purchase may be set by the court under subsection (4). Section 1434 does not specify the components of "fair value," and the court may find it useful to consider valuation methods that would be relevant to a judicial appraisal of shares under section 1330. The two proceedings are not wholly analogous, however, and the court should consider all relevant facts and circumstances of the particular case in determining fair value. For example, liquidating value may be relevant in cases of deadlock but an inappropriate measure in other cases. If the court finds that the value of the corporation has been diminished by the wrongful conduct of controlling shareholders, it would be appropriate to include as an element of fair value the petitioner's proportional claim for any compensable corporate injury. In cases where there is dissension but no evidence of wrongful conduct, "fair value" should be determined with reference to what the petitioner would likely receive in a voluntary sale of shares to a third party, taking into account his minority status. If the parties have previously entered into a shareholders' agreement that defines or provides a method for determining the fair value of shares to be sold, the court should look to such definition or method unless the court decides it would be unjust or inequitable to do so in light of the facts and circumstances of the particular case. The valuation date is set as the day before the filing of the petition under section 1430, although the court may choose an earlier or later date if appropriate under the circumstances of the particular case.

It is expected that an order pursuant to subsection (5) will ordinarily provide for payment in cash, subject, in the case of any payment by the corporation, to the provisions of section 640. However, mindful that cash settlement may sometimes impose hardship on the purchasers, subsection (5) recognizes the court's discretion to provide for payment of the purchase price in installments, but only "where necessary in the interests of equity." In determining whether installment payments are "necessary in the interests of equity," the court should weigh any

possible hardship to the purchaser against the petitioner's interest in receiving full and prompt payment of the value of his shares. Accordingly, before ordering payment in installments, the court should be satisfied with the purchaser's ability to meet the scheduled payments and to provide such security as the court deems necessary.

Otherwise, the contents of the order under subsection (5) are entirely subject to the court's discretion. The court may allow discovery to determine "fair value" or to decide if the petitioner is entitled to fees and expenses under the last sentence of subsection (5) or if interest should be withheld by virtue of the second sentence of that subsection.

c. Effect on petitioning shareholder. The entry of an order under either subsection (3) or (5) results in a dismissal, with prejudice, of the dissolution proceeding under section 1430(2) and terminates all rights of the petitioner as a shareholder. Thus, the order also terminates all claims that the petitioner may have had in his capacity as a shareholder, and the value of such claims must either be asserted as part of the "fair value" of the petitioner's shares or forever lost except as provided in subsection (7). Under subsection (6), claims asserted by the petitioner in any nonshareholder capacity, such as claims for back wages or indemnification, are not affected by the entry of an order nor does the order affect any rights the petitioner may have as a creditor with respect to shares pledged as security for the purchase price. Otherwise, the order is enforceable only in the same manner as any other judgment, and the petitioner may not seek to reopen the proceedings in the event of a default.

After the entry of an order under subsections (3) or (5), the petitioner is a creditor with respect to the electing shareholders who participate in the purchase, but any payments to be made by the corporation, other than fees and expenses awarded under subsection (5), are subject to section 640.

d. Appeal and the voluntary dissolution alternative. In addition to the usual rights of appeal available to any party under the laws of the local jurisdiction, subsection (7) affords the alternative of voluntary dissolution after entry of an order under subsection (5). The purchase ordered pursuant to subsection (5) may be consummated at any time during the 10 day period after the order becomes final and must be consummated on the 10th day unless the corporation has previously filed a notice of its intention to dissolve voluntarily. Articles of dissolution must be adopted and filed within the next 50 days. An appeal of the order to purchase stays the running of both the 10 and 50 day periods until the appeal is disposed of and the order becomes final.

If the corporation elects to adopt and file articles of dissolution, it may not thereafter revoke its dissolution pursuant to section 1404 but must proceed in accordance with the provisions of sections 1405--1407. If the corporation elects to dissolve, the petitioning shareholder will receive his pro rata share of the liquidating proceeds distributed to shareholders without reference to the "value" of his shares as determined by the court under subsection (5). By virtue of subsection (6), the petitioning shareholder would not be entitled to vote on a proposal to adopt articles of dissolution under section 1402. Once articles of dissolution are filed, however, subsection (7) provides that the order under subsection (5) is "no longer of any force or effect." Accordingly, subsection (6) no longer applies, the petitioner resumes shareholder status and will be entitled to a pro rata share of any liquidating distribution to shareholders. To prevent use of voluntary dissolution to evade responsibilities, subsection (6) further provides that the filing of articles of dissolution does not affect either the court's award of fees and expenses to the petitioner under subsection (5) or the petitioner's standing to pursue derivative claims on behalf of the corporation, provided that the derivative claims had been previously asserted by the petitioner in the section 1434 proceedings or otherwise.

IDAHO REPORTER'S COMMENT

Academic commentators on the problems of closely held corporations have long favored combinations of involuntary dissolution and buy-out to deal with the recurring dilemmas caused by deadlock. The 1997 revision added the second sentence in new subsection (1) to the Official Text in order to extend the buy-out election to publicly-held companies themselves but not to their non-petitioning shareholders. It would be impractical to extend any pro-rata buy-out election to numerous shareholders.

30-1-1435 — 30-1-1439. [Reserved.]

30-1-1440. Deposit with state treasurer. — Assets of a dissolved corporation that should be transferred to a creditor, claimant or shareholder

of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the state.

History.
I.C., § 30-1-1440, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Cross References.
State treasurer, § 67-1201 et seq.

ABA OFFICIAL COMMENT

Section 1440 is a deposit provision, not an escheat provision. It does not provide for ultimate disposition of unclaimed funds. Rather, it permits a corporation that has dissolved to pay over for safekeeping to the state treasurer (or other appropriate state official with statutory authority to receive such funds) funds belonging to a creditor, claimant, or shareholder who cannot be found.

The handling and ultimate disposition of unclaimed funds by the state treasurer or other appropriate state official is to be determined by state law other than the Model Act.

IDAHO REPORTER'S COMMENT

Since Idaho already had a very comprehensive abandoned property or escheat statute which outlined the procedure to be followed when property is unclaimed or abandoned, the 1979 revision modified § 104 of the prior (1969) Model Act (old I.C. § 30-1-104) to incorporate the predecessor of the current (1997) Idaho Uniform Unclaimed Property Act (I.C. §§ 14-501 through 542) and to provide that whenever a creditor or shareholder cannot be located in a liquidation proceeding, the funds are to be paid to the state tax collector to be administered and distributed under the escheat statute.

The 1997 revision modified Official Text section 1440 to achieve this same result achieved by prior I.C. § 30-1-104.

Part 15. Foreign Corporations

30-1-1501. Authority to transact business required. — (1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:

(a) Maintaining, defending or settling any proceeding;

(b) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

(c) Maintaining bank accounts;

(d) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities;

(e) Selling through independent contractors;

(f) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;

(g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
(i) Owning, without more, real or personal property;
(j) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature;
(k) Transacting business in interstate commerce.
(3) The list of activities in subsection (2) of this section is not exhaustive.

History.
I.C., § 30-1-1501, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

Cited in: KEB Enters., L.P. v. Smedley, 140 Idaho 746, 101 P.3d 690 (2004).

ABA OFFICIAL COMMENT

A state may prescribe the terms and conditions upon which a foreign corporation is permitted to transact business within the state, subject, of course, to the restrictions of the United States Constitution. Part 15 requires that a foreign corporation seeking to transact business within the state must (1) obtain a certificate of authority from the secretary of state and (2) maintain a registered office and appoint a registered agent within the state.

Section 1501(1) states the basic requirement that a foreign corporation must obtain a certificate of authority before it transacts business within the state. Section 1505 describes the scope of the privilege obtained by a certificate of authority while section 1502 describes the consequences of transacting business in the state without first obtaining the certificate of authority.

The Model Act does not attempt to formulate an inclusive definition of what constitutes the transaction of business. Rather, the concept is defined in a negative fashion by section 1501(2), which states that certain activities do not constitute the transaction of business. In general terms, any conduct more regular, systematic, or extensive than that described in section 1501(2) constitutes the transaction of business and requires the corporation to obtain a certificate of authority. Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes. But the passive owning of real estate for investment purposes does not constitute transacting business. See section 1501(2)(i).

The test of "transacting business" defined in a negative way in section 1501(2) applies only to the question whether the corporation's contacts with the state are such that it must obtain a certificate of authority. It is not applicable to other questions such as whether the corporation is amenable to service of process under state "long-arm" statutes or liable for state or local taxes. A corporation that has obtained (or is required to obtain) a certificate of authority to transact business under part 15 will generally be subject to suit and state taxation in the state, while a corporation that is subject to service of process or state taxation in a state will not necessarily be required to obtain a certificate of authority under part 15.

The list of activities set forth in section 1501(2) is not exhaustive. See section 1501(3). The list excludes several different types of activities from the definition of "transacting business," which are discussed below.

1. ENGAGING IN LITIGATION. Section 1501(2)(a) excludes "maintaining, defending or settling any proceeding." The word "proceeding" is defined in section 140 to include all civil, criminal, administrative, or investigative suits or actions. Thus, a corporation is not "transacting business" solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign corporation is not required to obtain a certificate of authority merely because it files a complaint with the state securities

commission or other governmental agency or participates in an administrative proceeding within the state.

2. INTERNAL AFFAIRS OF THE CORPORATION. A corporation does not "transact business" within a state under section 1501 merely because some of its internal affairs occur within a state. Thus, a corporation may hold meetings of its board of directors or shareholders within a state without first obtaining a certificate of authority (section 1501(2)(b)). It also may maintain offices or agencies within a state relating solely to the transfer, registration, or exchange of its shares without obtaining a certificate of authority (section 1501(2)(d)). Other activities relating to the internal affairs of the corporation that do not constitute the transaction of business under section 1501(2) include having officers or representatives of a corporation who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the affairs of the corporation without imposing on the corporation the requirement that it obtain a certificate of authority in the state, provided these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

3. MAINTAINING BANK ACCOUNTS. A foreign corporation may maintain a bank account with a bank within the state, make deposits and write checks on the account without obtaining a certificate of authority (section 1501(2)(c)).

4. INTERSTATE TRANSACTIONS. A corporation is not "transacting business" within the meaning of section 1501(1) if it is transacting business in interstate commerce (section 1501(2)(k)) or soliciting or obtaining orders that must be accepted outside the state before they become contracts (section 1501(2)(f)). These limitations reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. These sections should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign corporation is not required to obtain a certificate of authority even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. A corporation need not obtain a certificate of authority even if it also does work and performs acts within the state incidental to the interstate business, e.g., if it takes or enforces a security interest incidental to these transactions. Nor is it required to obtain a certificate of authority merely because it sends traveling salesmen or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained by a corporation in a state without obtaining a certificate of authority if the office's functions relate solely to interstate commerce.

Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property by a foreign corporation for shipment in interstate commerce out of the state does not require the corporation to obtain a certificate of authority.

5. SALES THROUGH INDEPENDENT CONTRACTORS. A foreign corporation does not need to obtain a certificate of authority if it sells goods in the state through independent contractors (section 1501(2)(e)). These transactions are viewed as transactions by the independent contractors, not by the corporation itself even though the corporation sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the corporation may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors and therefore engaged in the transaction of business in the state.

6. CREATING, ACQUIRING, OR COLLECTING DEBTS. The mere act of making a loan by a foreign corporation that is not in the business of making loans does not constitute transacting business in the state in which the loan is made. On the same theory a foreign corporation may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be transacting business. See section 1501(2)(g) and (h). Similarly, a refunding or "roll over" of a loan or its adjustment or compromise does not involve the transaction of business.

7. ISOLATED TRANSACTIONS. The concept of "transacting business" involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute the transaction of business if there is no intention to repeat the transaction or engage in similar transactions. Since the question is entirely one of fact, section 1501(2)(j) retains the partially objective test from earlier versions of the Model Act that a transaction completed within 30 days does not constitute "transacting business" if it is not one in the course of "repeated transactions of a like nature." A continuing transaction that is not completed within 30 days will likely require obtaining a certificate of authority, whether or not it is one of a number of repeated transactions, but that issue is not addressed by the Model Act. The 30-day provision is, in other words, a "safe harbor" for not requiring a certificate of authority.

8. OTHER TRANSACTIONS. Section 1501(3) makes clear that the list of transactions in section 1501(2) is not exhaustive. Among the large number of other transactions which do not

give rise to the requirement that a certificate of authority be obtained are the ownership of all the shares of stock in a corporation that is engaged in local business within the state or as a limited partner in a limited partnership engaged in local business, or taking ministerial actions such as filing financing statements or registering trademarks.

IDAHO REPORTER'S COMMENT

Model Act § 1501(1) restates in simplified form the basic principle from earlier versions such as prior I.C. § 30-1-106 that foreign corporations must qualify to "transact business" in the state by obtaining a certificate of authority from the secretary of state.

Section 1501(2), partially listing activities generally attributable to normal corporate existence and thus not constituting "doing business," is largely identical to prior I.C. § 30-1-106(a) - (j). Old I.C. § 106(h) added to the equivalent of new § 1501(2)(h) a cross reference to the Idaho code chapter on collection agencies. Model Act § 1501(2)(i) is new, relating to the mere ownership of real or personal property in the state, and is designed to clarify an area in which problems sometimes have arisen in the past.

Subsection (3) restates the non-exhaustive list idea in old I.C. § 106's second paragraph.

30-1-1502. Consequences of transacting business without authority. — (1) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(2) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

(3) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(4) A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed under this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed under this chapter for failure to pay such fees. The attorney general may collect all penalties due under this subsection.

(5) Notwithstanding subsections (1) and (2) of this section, the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state.

History.

I.C., § 30-1-1502, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Cross References.
Attorney general, § 67-1401 et seq.

JUDICIAL DECISIONS

Standing.
Delaware corporation had standing to bring an action seeking an easement over property because the transacting of business did not include the ownership of real property, and there was no allegation of any other business conducted in Idaho. Capstar Radio Operating Co. v. Lawrence, 143 Idaho 704, 152 P.3d 575 (2007).

ABA OFFICIAL COMMENT

The purpose of section 1502 is to induce corporations that are required to obtain a certificate of authority but have not to qualify promptly, without imposing harsh or erratic sanctions. The Model Act rejects the provisions adopted in a few states that make unenforceable intrastate transactions by unqualified corporations or that impose punitive sanctions or forfeitures on nonqualifying corporations. Often the failure to qualify is a result of inadvertence or bona fide disagreement as to the scope of the provisions of section 1501, which are necessarily imprecise; the imposition of harsh sanctions in these situations is inappropriate. Further, as a matter of state policy it is generally preferable to encourage qualification in case of doubt rather than to impose severe sanctions that may cause corporations to resist obtaining a certificate of authority in doubtful situations.

Section 1502 closes the courts of the state to suits maintained by corporations which should have but which have not obtained a certificate of authority. However, this sanction is not a punitive one: section 1502(5) states that the failure of the corporation to qualify does not affect the validity of corporate acts, including contracts. Thus, a contract made by a non-qualified corporation may be enforced by the corporation simply by obtaining a certificate. Further, section 1502(3) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so. Thus, the corporation will not be compelled to refile a suit if the corporation qualifies to transact business within a reasonable period. The purpose of these provisions is to encourage corporations to obtain certificates of authority and to eliminate the temptation to raise section 1502 defenses only after applicable statutes of limitation have run.

Section 1502(5) does not prevent a foreign corporation that has failed to obtain a certificate of authority from "defending any proceeding." The distinction between "maintaining" a proceeding under section 1502(1) and "defending any proceeding" under section 1502(5) is determined on the basis of whether affirmative relief is sought. A nonqualified corporation may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment or decree based on the counterclaim unless it has obtained a certificate of authority.

In addition to closing the courts of the state to a nonqualified foreign corporation, many states impose a penalty equal to all fees that the foreign corporation would have been liable for if it had qualified to transact business when it was first required to do so. [NOTE: This is the approach taken under new I.C. § 30-1-1502(4).] This penalty is usually defined to equal the sum of fees for each year or part thereof the corporation transacted business in the state without a certificate of authority. Similar provisions appeared in earlier versions of the Model Act, but were modified in the present ABA Official Text revision in favor of a specific dollar amount for each day and year the foreign corporation fails to qualify.

Section 1502(2) prevents evasion of section 1502(1) by an assignment of a claim on which the foreign corporation is barred from bringing suit under section 1502(1). If the successor has acquired all or substantially all of the assets of the foreign corporation, the successor may maintain suit after it has qualified. In the case of all other assignments, the foreign corporation itself must obtain a certificate of authority before the assignees may maintain suit on the claim. The phrase "all or substantially all" has the meaning set forth in the Official Comment to section 1201.

IDAHO REPORTER'S COMMENT

The most substantive change under the Official Text here would be with respect to the

financial penalty for transacting business without a certificate. Whereas prior I.C. § 30-1-124, 3d, imposed a penalty "equal to all fees and franchise taxes [?] which would have been imposed . . ." had the corporation qualified when first required, Model Act Official Text § 1502(4) instead opts for a specific dollar amount for each day and year the foreign corporation fails to qualify. The 1997 Idaho revision retains the existing § 124 approach [minus the reference to the long-discontinued franchise tax] and has modified Official Text subsection (4) accordingly.

Another important change is the innovation in subsection (3) providing for stays rather than dismissals of litigation where the claim is made that a plaintiff foreign corporation is disabled from suing for failure to qualify.

Otherwise, the changes seem to be organizational and stylistic.

30-1-1503. Application for certificate of authority. — (1) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing. The application must set forth:

(a) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of section 30-1-1506, Idaho Code;

(b) The name of the state or country under whose law it is incorporated;

(c) Its date of incorporation;

(d) The street address of its principal office;

(e) The information required by section 30-405(1), Idaho Code; and

(f) The names and usual business addresses of its current directors and officers.

(2) The foreign corporation shall deliver with the completed application a certificate of existence, or a document of similar import, duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated.

History.

I.C., § 30-1-1503, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 124, § 1, p. 291; am. 2007, ch. 314, § 19, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (1)(e), which formerly read: "The street address of its registered office in this state and the name of its registered agent at that office."

ABA OFFICIAL COMMENT

1. DISCLOSURE REQUIREMENTS IN GENERAL. Section 1503 provides that a foreign corporation seeking a certificate of authority to transact business in the state must file an application that contains the information set forth in this section. These disclosure requirements are supplemented by the requirements of other sections in this chapter — 1504, 1506, and 1507 — which require amended or supplemental filings in certain circumstances, and by section 1622, which requires every qualified foreign corporation to file annual reports containing specified information. Generally, the revised Model Act eliminates repetitious filings, so that information need be submitted to the secretary of state in only one document.

The purposes of these disclosure requirements are: (1) to ensure that citizens of the state have adequate information about foreign corporations in their transactions with them; (2) to put them in a status of equality with domestic corporations with respect to information required to be furnished; (3) to facilitate their subjection to the jurisdiction of the state's courts, thereby removing any disadvantage citizens of the state may have when dealing with them; and (4) to provide readily accessible evidence of their existence. Other statutes relating to various regulatory matters may require a qualified foreign corporation to provide additional information.

2. THE APPLICATION FOR A CERTIFICATE OF AUTHORITY. The information

required to be included in the application for a certificate of authority by section 1503 is the minimum needed to administer the filing requirements of the Model Act. The application must also be accompanied by a certificate of existence and the filing fee required by section 122. A corporation that qualifies to transact business in a state must comply with the requirements of various other statutes. See section 1505.

IDAHO REPORTER'S COMMENT

The changes here seem purely formalistic. Model Act § 1503(1) deletes two of the items of information previously required in the application under old I.C. § 30-1-110: (1) the subsection (e) statement of the purposes the corporation proposed to pursue in the state and (2) the subsection (g) "catchall" disclosure requirement which authorized the secretary of state to require additional information. The purposes disclosure is deleted since it was based on now obsolete limitations on purposes; and the catchall was eliminated as being redundant of the secretary of state's power described in §§ 121 and 130.

The § 1503(2) requirement to include a certificate of existence ("good standing") in the filing appeared in old I.C. § 30-1-111. The filing and effective date procedures previously contained in old I.C. § 30-1-111 are deleted from new Model Act § 1503 and centralized for the entire Model Act in part 1.

In subsection (1)(c), the 1997 Idaho revision dropped "and period of duration" from the Official Text.

30-1-1504. Amended certificate of authority. — (1) A foreign corporation authorized to transact business in this state must obtain an amended certificate of authority from the secretary of state if it changes:

(a) Its corporate name;

(b) The state or country of its incorporation; or

(c) Any of the information required by section 30-405(1), Idaho Code.

(2) The requirements of section 30-1-1503, Idaho Code, for obtaining an original certificate of authority apply to obtaining an amended certificate under this section.

History.

I.C., § 30-1-1504, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 20, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, added subsection (1)(c).

ABA OFFICIAL COMMENT

ABA Official Text section 1504 requires a foreign corporation to obtain an amended certificate of authority if it changes its corporate name, its duration [NOTE: A change of duration does not require any amended certificate under new I.C. § 30-1-1504(1).], or the state or country of its incorporation. An amendment is not necessary to reflect changes in its principal office address or in its current officers or directors since that information is supplied in the annual report. In addition, section 1507 requires an immediate filing if the foreign corporation changes its registered office or registered agent within the state.

Other fundamental changes by a foreign corporation do not require amendments to the certificate of authority. The secretary of state will be advised of most of these changes through the annual report. See section 1622. Thus, a person seeking to obtain current information about a foreign corporation should examine the annual reports of the corporation as well as the application for certificate of authority and amendments to it. This procedure of requiring most changes to be reported in the annual reports rather than as amendments to the certificate of authority should eliminate many unnecessary filings with the secretary of state without reducing the information available through the secretary of state's office.

IDAHO REPORTER'S COMMENT

The changes here seem insignificant. Old I.C. § 30-1-118 required amendment for name changes or a change of purposes. Official Text Model Act § 1504 would require amendment for name changes, duration changes and changes in situs of incorporation, but not for purposes changes. Old Idaho § 118 dealt with procedures for name changes; such procedures are covered in new Model Act § 1506, below.

The 1997 Idaho revision dropped Official Text subsection (1) reference to "the period of its duration."

30-1-1505. Effect of certificate of authority. — (1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this chapter.

(2) A foreign corporation with a valid certificate of authority has the same but not greater rights and has the same but no greater privileges as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(3) This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.

History.

I.C., § 30-1-1505, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A certificate of authority authorizes a foreign corporation to transact business in the state subject to the right of the state to revoke the certificate. The privileges of this status are defined in section 1505(2); a qualified foreign corporation has the same (but no greater) privileges as a domestic corporation.

Section 1505(2), by granting to qualified foreign corporations all of the rights and privileges enjoyed by a domestic corporation, avoids discrimination that might otherwise be subject to constitutional challenge. On the other hand, section 1505(2) also contains a restriction or limitation: a qualified foreign corporation is subject to the same restrictions as a domestic corporation, including the same duties, penalties, and liabilities. This latter aspect of section 1505(2) has declined in importance as states have eliminated unnecessary or outdated restrictions on domestic corporations and, as a consequence of section 1505(2), on qualified foreign corporations as well. In particular, section 1505(2) makes section 301 (corporate purposes) applicable to a qualified foreign corporation, and grants substantially the same powers to it as are possessed by a domestic corporation.

Section 1505(3) preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states.

IDAHO REPORTER'S COMMENT

Section 1505 assembles in a single section provisions appearing in different sections of the prior Idaho act. Subsection (1) correlates to old I.C. § 30-1-112. Subsection (2) is substantially the same as old I.C. § 30-1-107. And subsection (3) is to the same effect as the final clause in the third sentence of old I.C. § 30-1-106. In each instance, stylistic changes, but no substantive changes, are made.

30-1-1506. Corporate name of foreign corporation. — (1) If the corporate name of a foreign corporation does not satisfy the requirements of

section 30-1-401, Idaho Code, the foreign corporation to obtain or maintain a certificate of authority to transact business in this state must either:

(a) Add the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," to its corporate name for use in this state; or

(b) Use a fictitious name to transact business in this state if its real name is unavailable and it delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(2) Except as authorized by subsections (3) and (4) of this section, the corporate name, including a fictitious name, of a foreign corporation must be distinguishable upon the records of the secretary of state from:

(a) The name of any corporation, limited liability company, limited partnership or limited liability partnership organized under the laws of this state or authorized to transact business in this state;

(b) A reserved or registered name for a corporation, limited liability company or limited partnership; or

(c) The fictitious name of another foreign corporation authorized to transact business in this state.

(3) A foreign corporation may apply to the secretary of state for authorization to use in this state a name which is not distinguishable upon the records of the secretary of state from the name of any other legal entity whose organizational documents are filed with the secretary of state. The secretary of state shall authorize use of the name applied for if:

(a) The other entity consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the applying corporation; or

(b) The applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name in this state.

(4) A foreign corporation may use in this state a name which is the same as the name, including the fictitious name, of another domestic or foreign corporation or limited liability company organized under the laws of this state or authorized to transact business in this state, if the foreign corporation:

(a) Has been formed by reorganization of the other entity; or

(b) Has acquired all or substantially all of the assets, including the name, of the other entity.

(5) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of section 30-1-401, Idaho Code, it may not transact business in this state under the changed name, and it shall adopt a name satisfying the requirements of section 30-1-401, Idaho Code, and obtain an amended certificate of authority under section 30-1-1504, Idaho Code.

History.

I.C., § 30-1-1506, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 325, § 2, p. 1095.

ABA OFFICIAL COMMENT

The purpose of section 1506, like that of section 401 relating to the name of a domestic corporation is to ensure that names are not the same as or deceptively similar to other entities' names. Like section 401, it does not impose upon the secretary of state the responsibility of deciding issues of unfair competition or commercial similarity of names.

A foreign corporation applying for a certificate of authority must apply under its true corporate name if that name qualifies under section 1506(1) or (3). If the true corporate name qualifies except that it does not contain one of the words of corporateness set forth in section 1506(1), the corporation may simply add one of those words to its true corporate name and apply under that name as modified. Section 1506(1)(a). If the true corporate name is unavailable because it is the same as or deceptively similar to a name already in use or reserved, the corporation may use a fictitious name (if available) under section 1506(1)(b) simply by delivering to the secretary of state for filing, together with its application for a certificate of authority, a certified copy of a resolution of its board of directors authorizing the use of the fictitious name in the state. Finally, the otherwise unavailable name of a foreign corporation may be augmented by the name of the state of its incorporation so as to make it not the same as or deceptively similar to other entities' names. For example, a Delaware corporation, "Utopian Products, Inc." which finds that a domestic corporation is using that name, may qualify under the name "Utopian Products, Inc. (Delaware)."

A corporation that qualifies to transact business in the state may do business under an assumed name to the same extent as a domestic corporation. The name requirements of section 1506, including the fictitious name of a corporation whose real name is unavailable, are designed to ensure that each corporation qualified to transact business in this state has a unique official name. For a fuller description of the policies underlying section 1506, see the Official Comment to section 401.

If a foreign corporation changes its name it may (1) file an amended certificate of authority under its new name or, if the new name is not available, (2) continue to conduct business under its former name as an assumed name, or (3) adopt a new assumed name, by filing a certified resolution of its board of directors authorizing it to do so.

IDAHO REPORTER'S COMMENT

Model Act § 1506 is a substantial revision of earlier Model Act provisions (like prior I.C. § 30-1-108 and 109) dealing with the corporate name of foreign corporations. The revision is designed primarily to conform this section with the requirements of part 4, which deals with the corporate name of domestic corporations.

The more greatly detailed provisions of section 1506 are broadly based on the similar subject matter of old Idaho § 108, but the section has been entirely rewritten. Section 1506(5), dealing with a change of name by a foreign corporation, corresponds to old Idaho § 109.

The 1997 revision changed Official Text subsections (2) through (5) to retain the Idaho standard for name availability and to reflect ongoing administrative practice in the office of the Idaho secretary of state.

30-1-1507. Registered office and registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-1-1507, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. See § 30-401 et seq.

30-1-1508. Change of registered office or registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-1-1508, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. See § 30-401 et seq.

30-1-1509. Resignation of registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-1-1509, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. See § 30-401 et seq.

30-1-1510. Service on foreign corporation. — (1) The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation.

(2) A foreign corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the foreign corporation at its principal office shown in its application for a certificate of authority or the correspondence address indicated in its most recent annual report if the foreign corporation:

(a) Has no registered agent or its registered agent cannot with reasonable diligence be served;

(b) Has withdrawn from transacting business in this state under section 30-1-1520, Idaho Code; or

(c) Has had its certificate of authority revoked under section 30-1-1531, Idaho Code.

(3) Service is perfected under subsection (2) of this section at the earliest of:

(a) The date the foreign corporation receives the mail;

(b) The date shown on the return receipt, if signed on behalf of the foreign corporation; or

(c) Five (5) days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(4) This section does not prescribe the only means, or necessarily the required means, of serving a foreign corporation.

History.
I.C., § 30-1-1510, as added by 1997, ch. 366, § 2, p. 1080.

RESEARCH REFERENCES

A.L.R. — Validity, construction, and application of "fiduciary shield" doctrine — Modern cases. 79 A.L.R.5th 587.

ABA OFFICIAL COMMENT

Service on the registered agent is the typical method of service of process on a qualified foreign corporation. Section 1510(1). But if the corporation does not have a registered agent, or if the agent cannot be found at the registered office, section 1510(2) authorizes service on the secretary of the corporation at its principal office as shown in its certificate of authority or most recent annual report. Service may be effected in the same way on a corporation which has withdrawn from the state or whose certificate of authority has been revoked. Section 1510(3) establishes the date on which service is effective under section 1510(2), while section 1510(4) makes clear that the method of service provided by this section does not preclude the use of other means of effecting service of process. Service of process may also be effected, for example, under a "long-arm" statute or under other special statutes authorizing service in some other manner.

Section 1510 is patterned after section 504, relating to service of process on domestic corporations. For a fuller description of the policies underlying section 1510, see the Official Comment to section 504.

IDAHO REPORTER'S COMMENT

Model Act § 1510 closely follows the language of section 504, the parallel provision relating to service on domestic corporations.

Section 1510(3) goes beyond prior I.C. § 30-1-115 in specifying the time of perfection of service. Otherwise, the substance seems largely unchanged. Like previous Idaho law, and unlike Delaware, the Model Act does not specifically address the problem of service on nonqualified foreign corporations. But also like prior § 115's last ¶, the last ¶ of Model Act § 1510 preserves the possibility that the long-arm statute, or some other means of service, may be available against foreign corporations in general, whether qualified for not.

The 1997 Idaho revision added in subsection (2) the words "the correspondence address indicated."

30-1-1511 — 30-1-1519. [Reserved.]

30-1-1520. Withdrawal of foreign corporation. — (1) A foreign corporation authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the secretary of state.

(2) A foreign corporation authorized to transact business in this state may apply for a certificate of withdrawal by delivering an application to the secretary of state for filing. The application must set forth:

(a) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(b) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(c) That it revokes the authority of its registered agent to accept service on its behalf and agrees that service may be made on it by mailing copies of any process, notice or demand by registered or certified mail to the corporation and its officers at the addresses shown on the most current annual report filed with the secretary of state or as shown on any application for withdrawal of a corporation that has withdrawn from Idaho;

(d) A mailing address at which the service may be made under paragraph (c) of this subsection; and

(e) A commitment to notify the secretary of state in the future of any change in its mailing address.

(3) After the withdrawal of the corporation is effective, service of process under this section is service on the foreign corporation.

History.
I.C., § 30-1-1520, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A foreign corporation that ceases to transact business within a state may withdraw from the state only by obtaining a certificate of withdrawal. A foreign corporation that ceases to transact business in the state but fails to obtain a certificate of withdrawal will continue to be (1) subject to service of process on its registered agent or on its secretary pursuant to section 1510 and (2) liable for franchise and other taxes under other statutes [NOTE: no franchise taxes in Idaho].

The certificate of withdrawal provided by this section is recognition by the state that the foreign corporation has ceased to transact business in the state.

The application for certificate of withdrawal must appoint the secretary of state [NOTE: Not in Idaho! See new I.C. § 30-1-1520(c), above.] as the withdrawing corporation's agent for service of process in any proceeding based on a cause of action which arose during the time it was authorized to transact business in the state. The application must also set forth a mailing address to which any process may be forwarded, and the corporation must agree to notify the secretary of state of any change in that address. There is no time limit on the obligation to advise the secretary of state of changes of mailing address.

IDAHO REPORTER'S COMMENT

Section 1520 is generally similar to earlier Model Act versions and to prior I.C. § 30-1-119. There are, however, several minor changes.

The first sentence of old § 119 is rephrased in section 1520(1) to make clear that a corporation's withdrawal is effective only upon compliance with this section. The disclosure requirements in section 1520(2) are slightly changed from old § 119. The old subsection (d) reference to "substitute service" under § 115 (mail to the corporation) is replaced in Official Text Model Act § 1520(2)(c) by provision for service on the secretary of state. The 1997 Idaho revisers decided to retain the existing provision for substitute service by mail to the corporation and modified the Official Text accordingly. Further, the old subsection (f) authorization to the secretary of state to require additional information so as to determine and assess unpaid fees is deleted in the Model Act.

The old I.C. § 30-1-120 filing procedures are deleted in Model Act § 1520 and as usual centralized in part 1.

30-1-1521 — 30-1-1529. [Reserved.]

30-1-1530. Grounds for revocation of certificate of authority. — The secretary of state may commence a proceeding under section 30-1-1531, Idaho Code, to revoke the certificate of authority of a foreign corporation authorized to transact business in this state if:

(1) The foreign corporation does not deliver its annual report to the secretary of state by the date on which it is due;

(2) The foreign corporation is without a registered agent in this state for sixty (60) days or more;

(3) The secretary of state has credible information that the foreign corporation has failed to notify the secretary of state within sixty (60) days of the occurrence that its registered agent has changed or that its registered agent has resigned;

(4) The secretary of state has credible information that an incorporator, director, officer or agent of the foreign corporation signed a document he

knew was false in any material respect with intent that the document be delivered to the secretary of state for filing; or

(5) The secretary of state receives a duly authenticated certificate from the official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated, stating that it has been dissolved or disappeared as a result of a merger.

History.

I.C., § 30-1-1530, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 22, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsection (2), deleted "or registered office" following "agent"; and in subsection (3), deleted "or registered office" following the first occurrence of "agent" and "or that its registered office has been discontinued" from the end.

ABA OFFICIAL COMMENT

Section 1530 authorizes the administrative revocation of the certificate of authority of a foreign corporation on the grounds specified. Administrative revocation is effective only upon compliance with the procedure specified in section 1531. A foreign corporation that believes the administrative revocation is unwarranted may obtain judicial review of the secretary of state's determination pursuant to section 1532.

If a qualified foreign corporation has dissolved or merged into another corporation, the secretary of state may proceed to revoke its certificate of authority to transact business solely on the basis of a certificate from the secretary of state or other official of the state of incorporation. Section 1530(5). This subsection provides a simple and inexpensive method to eliminate the names of corporations that are no longer in existence from the records of the secretary of state, thereby making available the corporate names for use by other entities.

Section 1530 is patterned after section 1420, relating to the administrative dissolution of domestic corporations. See the Official Comment to section 1420 for a fuller description of the policies underlying section 1530.

IDAHO REPORTER'S COMMENT

Section 1530 is roughly similar to prior I.C. § 30-1-121, with changes necessary for consistency with other sections in part 15 and with stylistic and minor substantive changes. For example, the old § 121(c) revocation grounds for failure to file mergers or amendments is deleted. And old § 121(d) was more broadly stated than the corresponding provision for revocation for fraudulent filing in new Model Act § 1530(4). Finally, Model Act subsection (5) is new, providing for revocation upon notification from the state of incorporation that the corporation's existence is terminated.

This new section 1530 had also been modified from the Official Text to conform with ongoing practices in the Idaho secretary of state's office.

30-1-1531. Procedure for and effect of revocation. — (1) If the secretary of state determines that one (1) or more grounds exist under section 30-1-1530, Idaho Code, for revocation of a certificate of authority, he shall give notice of his determination to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the foreign corporation has not yet filed an annual report, to its registered office.

(2) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty

(60) days after receipt of the notice of determination, the secretary of state may revoke the foreign corporation's certificate of authority by noting the fact of revocation and the effective date thereof in his records. The secretary of state shall give notice of the revocation to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report, or if the foreign corporation has not yet filed an annual report, to its registered office.

(3) The authority of a foreign corporation to transact business in this state ceases on the date shown on the notice of revocation of its certificate of authority.

(4) Service of process on a foreign corporation whose certificate of authority has been revoked may be made upon its registered agent, if any, or pursuant to section 30-1-1510, Idaho Code.

(5) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

History.

I.C., § 30-1-1531, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The procedure for revocation of a certificate of authority in section 1531 establishes a simple method of completing the revocation while at the same time ensuring that the foreign corporation is advised of the contemplated action and has an opportunity to contest it in appropriate situations. In most situations, revocation by the secretary of state will not be contested.

After revocation, service of process on the foreign corporation is per new subsection (4).

Section 1531 is patterned after section 1421, relating to the administrative dissolution of a domestic corporation. See the Official Comment to section 1421 for a fuller statement of the policies underlying section 1531.

IDAHO REPORTER'S COMMENT

Other than the "default service on the secretary of state" provisions in ABA Official Text subsection (4), Model Act § 1531 makes only stylistic and some minor substantive changes as compared to the procedures outlined in prior I.C. §§ 30-1-121 and 122. The 1997 revision did not adopt the Official Text default service provisions. The 1997 revision did revise the Official Text to conform to ongoing procedures in the secretary of state's office. Subsection (5) has no direct analogue in the prior Idaho act.

As usual the detailed filing provisions are deleted out of deference to the uniform provisions in part 1.

30-1-1532. Appeal from revocation. — (1) A foreign corporation may appeal the secretary of state's revocation of its certificate of authority to the fourth district court, Ada county, Idaho, within thirty (30) days after receipt of the notice of revocation. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the notice of revocation from the secretary of state.

(2) The court may summarily order the secretary of state to reinstate the certificate of authority or may take any other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

History.
I.C., § 30-1-1532, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

A corporation whose certificate of authority is revoked may obtain judicial review of the revocation decision. In the review proceeding the court may summarily order the secretary of state to reinstate the corporation or take other action it deems appropriate.

The court with jurisdiction over an appeal should be specified; it is typically either a court in the state capital or a court in the county in which the corporation's principal office is located. Moreover, states adopting this section of the Model Act should specify who has the burden of proof on appeal and the standard for judicial review. See the Official Comment to section 126.

IDAHO REPORTER'S COMMENT

This section is new to Idaho law and parallels section 1423 on appeal from denial of reinstatement following administrative dissolution of a domestic corporation, above. The appropriate designated court is in Ada County. As for the burden of proof and standard for judicial review, as noted in the Idaho reporter's comment above to section 1423, it would seem that the burden of proof would be on the corporation to show clear error, abuse of process or the like.

Part 16. Records and Reports

30-1-1601. Corporate records. — (1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation, all amendments to them currently in effect, and any notices to shareholders referred to in section 30-1-120(11)(e), Idaho Code, regarding facts on which a filed document is dependent;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;

(c) Resolutions adopted by its board of directors creating one (1) or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;

(d) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three (3) years;

(e) All written communications to shareholders generally within the past three (3) years, including the financial statements furnished for the past three (3) years under section 30-1-1620, Idaho Code;

(f) A list of the names and business addresses of its current directors and officers; and

(g) Its most recent annual report delivered to the secretary of state under section 30-1-1622, Idaho Code.

History.

I.C., § 30-1-1601, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 76, p. 907.

ABA OFFICIAL COMMENT

Section 1601 describes in general terms the records every corporation must keep or maintain, the form in which they may be maintained, and, to a limited extent, where the records must be kept.

1. MINUTES AND RELATED DOCUMENTS. Section 1601(1) requires a corporation to "keep" as permanent records the minutes of meetings of its shareholders and board of directors, and a record of actions taken by unanimous consent by its shareholders or board of directors. In addition, each corporation must "keep" a record of all actions taken by a committee of the board of directors when acting on behalf of the board of directors for the corporation; this includes, for example, action taken by an executive committee between meetings of the board and final action of a special litigation committee authorized to act on behalf of the board. Section 1601(1) does not require a record of actions taken by a committee when the committee is not acting in place of the board of directors, e.g., when the committee is discussing policy and formulating recommendations for action by the board of directors. Also, it does not require either minutes or a record of committee deliberations under any circumstances. Committee meetings are preserved as forums for open and frank discussion and discussion of sensitive corporate data without fear of recordation or disclosure.

Section 1601 also does not address the amount of detail that should appear in the minutes of meetings of shareholders or the board of directors — the content of minutes is largely fixed by tradition and no inference about their content should be drawn from the section's treatment of the records of committee deliberation and action.

2. SHAREHOLDERS' LISTS AND ACCOUNTING RECORDS. Sections 1601(2) and (3) require the corporation to "maintain" appropriate accounting and shareholder records. The word "maintain" is used to denote current records only and does not require the corporation to keep on hand, as permanent records, data or information of historical interest only; the periods for which these records, data, or information should be kept is not addressed by the Model Act.

Section 1601(2) relates to accounting records. The word "appropriate" is used to indicate that the nature of the financial records to be kept is dependent to some extent on the nature of the corporation's business; the phrase "adequate records" is used in some state statutes to convey essentially the same meaning. "Appropriate" records are generally records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation. In some very small businesses operating on a cash basis, however, "appropriate" accounting records may consist only of a check register, vouchers, and receipts.

Section 1601(3) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of shareholders when required. These records may consist of stubs from which certificates have been detached in the case of corporations with a few shareholders or of elaborate electronic data retrievable only by modern technology in the case of large, publicly held corporations. The record may be retained by the corporation or an agent, who traditionally is the transfer agent but may be another agent.

3. FORM OF RECORDS. Section 1601(4) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances. The basic requirement is that the method chosen must be capable of reduction to written form within a reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders of record as required by section 1601(3).

4. KEEPING RECORDS AT PRINCIPAL OFFICE. Section 1601(5) requires certain basic records to be kept at the principal office of the corporation, including minutes of shareholders'

meetings for the preceding three years and records of shareholder action taken without a meeting during the same period. This requirement is imposed because these records must be available for inspection by any shareholder at that office. See section 1602(1). The "principal office" of the corporation is defined in section 140 to be the location of the executive offices of the corporation, and its address must be set forth by the corporation in its annual report required by section 1622. The Model Act does not generally specify where records other than those described in section 1601(5) must be kept. They may be kept in one or more offices within or without the state; indeed, in the case of records kept in nonwritten form, it may be impossible to determine "where" they are located.

IDAHO REPORTER'S COMMENT

Section 1601 deals with corporate records in a more specific and systematic manner than prior I.C. § 30-1-52. Section 52 described mandatory corporate records in the most general terms. Each corporation was required to keep "correct and complete" books and records of account as well as minutes of proceedings of shareholders and directors, and a record of shareholders, "giving the names and addresses of all shareholders and the number and class of the shares held by each."

The 1997 Idaho revision deleted from the end of the Official Text's subsection (5) list "(g) its most recent annual report . . ." since such is readily available from the secretary of state.

The phrase "correct and complete" with respect to accounting records was changed to "appropriate" in section 1601(2) after ABA Committee consultation with members of the accounting profession as to the most accurate phrase to describe the obligation of corporations of various sizes and in various businesses to maintain accounting records.

30-1-1602. Inspection of records by shareholders. — (1) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 30-1-1601(5), Idaho Code, if he gives the corporation written notice of his demand at least five (5) business days before the date on which he wishes to inspect and copy.

(2) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (3) of this section and gives the corporation written notice of his demand at least five (5) days before the date on which he wishes to inspect and copy:

(a) Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 30-1-1602(1), Idaho Code;

(b) Accounting records of the corporation; and

(c) The record of shareholders.

(3) A shareholder may inspect and copy the records described in subsection (2) of this section only if:

(a) He has been a holder of record of shares or of voting trust certificates for at least six (6) months immediately preceding his demand or shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent (5%) of all the outstanding shares of the corporation;

(b) His demand is made in good faith and for a proper purpose;

(c) He describes with reasonable particularity his purpose and the records he desires to inspect; and

(d) The records are directly connected with his purpose.

(4) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(5) This section does not affect:

(a) The right of a shareholder to inspect records under section 30-1-720, Idaho Code, or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;

(b) The power of a court, independently of this chapter, to compel the production of corporate records for examination.

(6) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.

History.

I.C., § 30-1-1602, as added by 1997, ch. 366, § 2, p. 1080.

JUDICIAL DECISIONS

In General.

Summary judgment was properly granted because plaintiff's requests for the corporate records did not comply with statutory requirements. Win of Mich., Inc. v. Yreka United, Inc., 137 Idaho 747, 53 P.3d 330 (2002).

ABA OFFICIAL COMMENT

1. SECTION 1602(1). Section 1602(1) provides that every shareholder is entitled to examine upon written request at the principal office of the corporation all documents described in section 1601(5). These documents all deal with the shareholder's interest as such in the corporation. While some of these documents may also be a matter of public record in the office of the secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation of which he is a shareholder.

2. SECTION 1602(2). Section 1602(2) grants a shareholder who meets the requirements of section 1602(3) the right to inspect three classes of corporate records:

(1) Excerpts from minutes of meetings of the board of directors, records of action of committees of the board of directors when acting in place of the board on behalf of the corporation, and minutes of meetings of shareholders (to the extent they do not fall within section 1602(1)). The corporation is required to make available only relevant excerpts of minutes and need not make available minutes of entire meetings merely because a portion of the minutes is directly connected with the shareholder's purpose.

(2) The accounting records of the corporation. The Act does not attempt to define what accounting records must be kept. See the Official Comment to section 1601.

(3) The record of shareholders, subject to section 1603(4). If a shareholder makes his demand in good faith and with a proper purpose under section 1602(3), he is entitled to inspect the shareholders' list under section 1602(2) without regard to the size or value of his holding. [NOTE: Not in Idaho! The 1997 revision retained in new I.C. § 30-1-1602(3)(a) the prior I.C. § 30-1-52, 2d , conditions on the shareholders' list inspection right, namely, ownership for at least six months or of at least five percent of all outstanding shares.] This right is independent of the right to inspect a shareholders' list immediately before a meeting under section 720. See section 1602(5).

3. SECTION 1602(3). Section 1602(3) follows earlier versions of the Model Act and permits inspection of the records described in section 1602(2) by a shareholder only if his demand is made in good faith and for a "proper purpose" [NOTE: and in Idaho only if he also either has been a shareholder for at least six months or owns at least five percent of all outstanding shares]. A "proper purpose" means a purpose that is reasonably relevant to the demanding shareholder's interest as a shareholder. Some statutes do not use the phrase "proper purpose;" the Model Act continues to use it because it is traditional and well-understood language

defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable under the revised Act.

As a practical matter, a shareholder who alleges a purpose in general terms, such as a desire to determine the value of his shares, to communicate with fellow shareholders, or to determine whether improper transactions have occurred, has been held to allege a "proper purpose." Section 1602(3) thus attempts to require more meaningful statements of purpose, if feasible, by requiring that a shareholder designate "with reasonable particularity" his purpose and the records he desires to inspect; the records demanded must also be "directly connected" with that purpose. If disputed by the corporation, the "connection" of the records to the shareholder's purpose may be determined by a court's in camera examination of the records.

4. SECTIONS 1602(4) AND (5). Section 1602(4) states that the inspection rights granted by this part are inherent rights of shareholders and may not be abolished or limited by the articles of incorporation or bylaws; the subsection is based on Cal. Corp. Code Ann. § 1600(d) (West 1977). No inference of any kind should be drawn from this subsection as to whether other, unrelated sections of the Model Act may be modified by provisions in the articles of incorporation or bylaws.

Section 1602(5) provides that the right of inspection granted by section 1602 is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist (1) under section 720, to inspect the shareholders' list following the establishment of a record date for a meeting; (2) as part of a right of discovery that exists in connection with litigation; and (3) as a "common law" right of inspection, if any is found to exist by a court, to examine corporate records. Section 1602(5) simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.

5. SECTION 1602(6). Section 1602(6) extends the inspection rights provided by section 1602 to beneficial owners of shares held by a nominee or in a voting trust. It was added as a technical correction to the revised Model Act in 1986.

IDAHO REPORTER'S COMMENT

Model Act § 1602 adopts a whole new approach to the complex problem of ensuring that corporate records are available for inspection in proper circumstances on the one hand, and that the right of inspection is not used for improper purposes on the other. Official Text section 1602 does not adopt the distinction based on the size of the shareholder's holding or the period for which he has been a shareholder. Cf. prior I.C. § 30-1-52, 2d. The 1997 Idaho revision retained the previous Idaho approach by adding new subsection (3)(a) to the Official Text. The old penalty approach (see prior I.C. § 30-1-52, 3d) was rejected in the 1997 revision in part because of courts' reluctance to impose penalties on officers or agents for actions taken on behalf of their principal and in part because concern for personal responsibility for large penalties may cause officers or agents to ignore their responsibilities to their principals.

Section 1602 sets forth with some precision the standards to be applied to all requests for inspection. Section 1604 provides sanctions against a corporation that refuses to grant inspection other than in good faith.

30-1-1603. Scope of inspection right. — (1) A shareholder's agent or attorney has the same inspection and copying rights as the shareholder represented.

(2) The right to copy records under section 30-1-1602, Idaho Code, includes, if reasonable, the right to receive copies by xerographic or other means, including copies through an electronic transmission if available and so requested by the shareholder.

(3) The corporation may comply at its expense with a shareholder's demand to inspect the record of shareholders under section 30-1-1602(2)(c), Idaho Code, by providing the shareholder with a list of shareholders that was compiled no earlier than the date of the shareholder's demand.

(4) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder.

The charge may not exceed the estimated cost of production, reproduction or transmission of the records.

History.
I.C., § 30-1-1603, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 77, p. 907.

ABA OFFICIAL COMMENT

The right of inspection set forth in section 1602 includes the general right to copy the documents inspected. Section 1603 follows precedent established under earlier statutes and extends the right of inspection to an agent or attorney of a shareholder as well as the shareholder himself. Further, the section now recognizes that a right to copy means more than a right to copy by longhand and extends to the right to receive, if reasonable, copies made by the modern technology of copying machines with the cost of reproduction being paid by the shareholder.

Many corporations make available to shareholders without charge some or all of the basic documents described in section 1601(5). Section 1603(3) authorizes the corporation to charge a reasonable fee based on reproduction costs (including labor and materials) for providing a copy of any document.

Section 1603(4) is designed to give the corporation the option of providing a reasonably current list of its shareholders instead of granting the right of inspection; a "reasonably current" list is defined in section 1603(4) as one compiled no earlier than the date of the written demand, which under section 1602(2) must provide at least five days' notice.

The phrase "estimated cost of production or reproduction of the records" in section 1603(3) refers to the cost of assembling information and data to meet a demand as well as the cost of reproducing documents that are already in existence.

IDAHO REPORTER'S COMMENT

Section 1603, defining the scope of the shareholder inspection right, expands on the provision in prior I.C. § 30-1-52's 2d that a shareholder has the right to examine books and records "in person, or by agent or attorney." This expanded treatment is new, but to a substantial effect it just codifies the common sense practices followed by courts and corporations in granting rights of inspection and provides specific statutory authorization for the corporation to impose a reasonable charge for providing copies of documents.

30-1-1604. Court-ordered inspection. — (1) If a corporation does not allow a shareholder who complies with section 30-1-1602(1), Idaho Code, to inspect and copy any records required by that subsection to be available for inspection, the Idaho district court of the county where the corporation's principal office is located or, if none in this state, Ada county, may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

(2) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with section 30-1-1602(2) and (3), Idaho Code, may apply to the Idaho district court of the county where the corporation's principal office is located or, if none in this state, Ada county, for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(3) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

(4) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

History.
I.C., § 30-1-1604, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 23, p. 887.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 314, in subsections (1) and (2), substituted "corporation's principal office is located or, if none in this state, Ada county" for "corporation's principal office, or, if none in this state, its registered office, is located."

ABA OFFICIAL COMMENT

Section 1604 provides a judicial remedy if a corporation refuses to grant the right of inspection provided by section 1602.

If the right of inspection under section 1602(1) is invoked and the corporation refuses to grant inspection, the shareholder may seek a summary order compelling inspection. A summary order is appropriate since the right of inspection under this subsection is either automatic or subject only to a determination that the person is in fact a shareholder of the corporation. By contrast, if inspection is demanded under section 1602(2), the shareholder's good faith and purpose may be in issue; in this situation section 1604(2) directs the court to handle the proceeding "on an expedited basis." The purpose of this phrase is to discourage dilatory tactics to avoid or delay inspection without requiring the court to resolve these issues on a summary basis. This language does not mandate any specific procedure by which these issues are to be resolved.

If a court enters a summary order directing inspection under section 1602(1), the cost of reproducing the records, if any, is placed on the corporation. Section 1604 does not address who should bear the cost of reproducing other records ordered by the court; this is a matter for the courts to decide in light of the policy of the Model Act that costs of reproduction are generally the responsibility of the requesting shareholder and should be assessed against him.

The principal sanction against unreasonable delay or refusal to grant inspection is provided by section 1604(3), which imposes on the corporation the plaintiff's costs, including attorneys' fees, unless the corporation can establish that it acted reasonably. The corporation may avoid these costs by showing that the corporation refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded. This normally will involve reasonable doubt whether the shareholder had the necessary good faith and proper purpose or whether the records demanded are directly connected to the shareholder's purpose. The phrase "in good faith because it had a reasonable basis for doubt" establishes a partially objective standard, in that the corporation must be able to point to some objective basis for its doubt that the shareholder was acting in good faith or had a purpose that was proper. For example, a corporation may point to earlier conduct of the shareholder involving improper use of information obtained from the corporation in the past as indicating that reasonable doubt existed as to his present purpose. A corporation may not avoid the imposition of costs under this section merely by showing it had no information one way or the other about the issues in controversy.

Earlier versions of the Model Act and the statutes of many states imposed a penalty upon the corporation or its officers for refusal to permit inspection of books and records by shareholders who (1) had been shareholders for at least six months or (2) owned five percent or more of the outstanding shares. This penalty provision has been omitted. A penalty unrelated to the costs of securing inspection was arbitrary and, as a result, was seldom actually enforced; further, a qualification based on the size or duration of the shareholder's holding unrelated to his actual purpose was subject to the criticism that it constituted unreasonable discrimination against small shareholders. [NOTE: Again, any such criticism was rejected in the 1997 Idaho revision retaining such qualification in I.C. § 30-1-1602(3)(a).]

IDAHO REPORTER'S COMMENT

The change here was alluded to earlier in the Idaho reporter's comment to section 1602. Prior I.C. § 30-1-52, 3d, sought to prevent improper refusals to permit shareholder inspection by

imposing a penalty on corporate officers or agents. Model Act § 1604 adopts a new approach to this problem and substitutes a single remedy - judicial action - for the more complex approach of old I.C. § 52. The critical factor to note with respect to section 1604 is that it imposes all of the shareholder's litigation costs on the corporation if the court orders inspection, unless the corporation can establish "that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."

30-1-1605. Inspection of records by directors. — (1) A director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a committee, but not for any other purpose or in any manner that would violate any duty to the corporation.

(2) The district court of the county where the corporation's principal office is located, or if none in this state, Ada county, may order inspection and copying of the books, records and documents at the corporation's expense, upon application of a director who has been refused such inspection rights, unless the corporation establishes that the director is not entitled to such inspection rights. The court shall dispose of an application under this subsection on an expedited basis.

(3) If an order is issued, the court may include provisions protecting the corporation from undue burden or expense, and prohibiting the director from using information obtained upon exercise of the inspection rights in a manner that would violate a duty to the corporation, and may also order the corporation to reimburse the director for the director's costs, including reasonable counsel fees, incurred in connection with the application.

History.

I.C. § 30-1-1605, as added by 2004, ch. 324, § 78, p. 907; am. 2007, ch. 314, § 24, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsection (2), substituted "district court" for "appropriate court" and "corporation's principal office is located, or if none in this state, Ada county" for "corporation's principal office, or if none in this state, its registered office, is located."

30-1-1606. Exception to notice requirement. — (1) Whenever notice is required to be given under any provision of this chapter to any shareholder, such notice shall not be required to be given if:

(a) Notice of two (2) consecutive annual meetings, and all notices of meetings during the period between such two (2) consecutive annual meetings, have been sent to such shareholder at such shareholder's address as shown on the records of the corporation and have been returned undeliverable; or

(b) All, but not less than two (2), payments of dividends on securities during a twelve (12) month period, or two (2) consecutive payments of dividends on securities during a period of more than twelve (12) months, have been sent to such shareholder at such shareholder's address as shown on the records of the corporation and have been returned undeliverable.

(2) If any such shareholder shall deliver to the corporation a written notice setting forth such shareholder's then-current address, the requirement that notice be given to such shareholder shall be reinstated.

History.
I.C., § 30-1-1606, as added by 2004, ch. 324, § 79, p. 907.

30-1-1607 — 30-1-1619. [Reserved.]

30-1-1620. Financial statements for shareholders. — (1) A corporation upon written shareholder request shall furnish its shareholders annual financial statements or, if annual financial statements are not available, other appropriate accounting records, which may be consolidated or combined statements of the corporation and one (1) or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders' equity for the year unless that information appears elsewhere in the financial statements. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(2) If any annual financial statements furnished pursuant to subsection (1) of this section are reported upon by a public accountant, his report must accompany them. If not, the statements must be accompanied by a statement of the president or the person responsible for the corporation's accounting records:

(a) Stating his reasonable belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(b) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

History.
I.C., § 30-1-1620, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The requirement that a corporation regularly submit some financial information to shareholders is appropriate considering the relationship between corporate management and the shareholders as the ultimate owners of the enterprise. This requirement was first added as an amendment in 1979 to the 1969 Model Act. [NOTE: Cf. prior I.C. § 30-1-52, 5th, conditioning the requirement "upon the written request of any shareholder." This condition was retained in the 1997 revision. See I.C. § 30-1-1620(1).]

Section 1620 has its principal impact on small, closely held corporations, since enterprises whose securities are registered under federal statutes are required to supply audited financial statements to shareholders. The securities of the vast majority of corporations in the United States are not registered under federal law. It is these corporations that section 1620 principally affects.

Section 1620 requires every corporation to prepare and submit to shareholders [again, in Idaho conditioned "upon written shareholder request"] annual financial statements consisting of a balance sheet as of the end of the fiscal year, an income statement for the year, and a statement of changes in shareholders' equity for the year. The last statement may be omitted

if the data that normally appears in that statement appears in the other financial statements or in the notes thereto. Consolidated statements of the corporation and any subsidiary, or subsidiaries, or combined statements for corporations under common control, may be used. But section 1620 does not require financial statements to be prepared on the basis of generally accepted accounting principles ("GAAP"). Many small corporations have never prepared financial statements on the basis of GAAP. "Cash basis" financial statements (often used in preparing the tax returns of small corporations) do not comply with GAAP. Even closely held corporations that keep accrual basis records, and file their federal income tax returns on that basis, frequently do not make the adjustments that may be required to present their financial statements on a GAAP basis. In light of these considerations, it would be too burdensome on some small and closely held corporations to require GAAP statements. If a corporation does prepare financial statements on a GAAP basis for any purpose for the particular year, however, it must send those statements to the shareholders as provided by the last sentence of section 1620(1).

Section 1620(2) requires an accompanying report or statement in one of two forms: (1) if the financial statements have been reported upon by a public accountant, his report must be furnished; or (2) in other cases, a statement of the president or the person responsible for the corporation's accounting records must be furnished (a) stating his reasonable belief as to whether the financial statements were prepared on the basis of generally accepted accounting principles, and, if not, describing the basis on which they were prepared, and (b) describing any respects in which the financial statements were not prepared on a basis of accounting consistent with those prepared for the previous year.

Section 1620 refers to a "public accountant." The same terminology is used in section 830 (standards of conduct for directors) of the Model Act. In various states different terms are employed to identify those persons who are permitted under the state licensing requirements to act as professional accountants. Phrases like "independent public accountant," "certified public accountant," "public accountant," and others may be used. In adopting the term "public accountant," the Model Act uses the words in a general sense to refer to any class or classes of persons who, under the applicable requirements of a particular jurisdiction, are professionally entitled to practice accountancy.

In requiring a statement by the president or person responsible for the corporation's financial affairs, it is recognized that in many cases this person will not be a professionally trained accountant and that he should not be held to the standard required of a professional. To emphasize this difference, section 1620 requires a "statement" (rather than a "report" or "certificate") and calls for the person to express his "reasonable belief" (rather than "opinion") about whether or not the statements are prepared on the basis of GAAP or, if not, to describe the basis of presentation and any inconsistencies in the basis of the presentation as compared with the previous year. He is not required to describe any inconsistencies between the basis of presentation and GAAP. If the statements are not prepared on a GAAP basis, the description would normally follow guidelines of the accounting profession as to the reporting format considered appropriate for a presentation which departs from GAAP. (See, e.g., "Statement on Auditing Standards No. 14" of the American Institute of Certified Public Accountants.) For example, the description might state, with respect to a cash basis statement of receipts and disbursements, that the statement was prepared on that basis and that it presents the cash receipts and disbursements of the entity for the period but does not purport to present the results of operations on the accrual basis of accounting.

ABA Official Text section 1620(3) [NOTE: Subsection (c) was deleted in the 1997 Idaho revision.] specifies that annual financial statements are to be mailed to each shareholder within 120 days after the close of each fiscal year, further emphasizing that the statements required to be delivered are annual statements and not interim statements. In addition, if a shareholder was not mailed the corporation's latest annual financial statements, he may obtain them on written request. See also section 1601(5)(e).

Failure to comply with the requirements of section 1620 does not adversely affect the existence or good standing of the corporation. Rather, failure to comply gives an aggrieved shareholder rights to compel compliance or to obtain damages, if they can be established, under general principles of law.

IDAHO REPORTER'S COMMENT

The biggest change here under the Official Text would have been requiring that annual financial statements be mailed to every shareholder. Prior I.C. § 30-1-52, 5th , conditioned the mailing requirement "upon the written request of any shareholder . . ." The 1997 Idaho revision added this previous Idaho condition to new subsection (1).

In addition, new Model Act § 1620(1) specifies the required financials, and subsection (2) speaks to "certification." Also, the language has been conformed with current usage in the accounting profession.

Finally, the 1997 revision deleted Official Text subsection (3) which specifies that annual financial statements be mailed to each shareholder within 120 days after the close of each fiscal year. This was deleted in view of Idaho's 1997 changes to Official Text subsection (1), above.

30-1-1621. Other reports to shareholders. — (1) If a corporation indemnifies or advances expenses to a director under section 30-1-851, 30-1-852, 30-1-853 or 30-1-854, Idaho Code, in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders' meeting.

(2) If a corporation issues or authorizes the issuance of shares for promissory notes, the corporation shall report in writing to the shareholders the number of shares authorized or issued, and the consideration received by the corporation, with or before the notice of the next shareholders' meeting.

History.

I.C., § 30-1-1621, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

Section 1621 requires two types of financial transactions to be reported to the shareholders with or before the notice of the next meeting of shareholders:

(1) decisions to grant indemnification under sections 850-859;

(2) decisions to issue shares to persons for promissory notes under section 6.21.

These types of transactions are likely to be viewed as sensitive by shareholders. The conclusion that shareholders should be notified of these transactions was reached as part of the substantive decisions authorizing and regulating these transactions in part 6 and sections 850-859. They are codified in section 1621, rather than in the substantive sections, because they deal with reports to shareholders.

1. INDEMNIFICATION. Section 1621(1) requires reporting to shareholders of payments made to directors or officers either for indemnification under sections 851, 852, and 854 or for advances for expenses under sections 853 and 854. Some academic criticism of earlier versions of the Model Act pointed out the possible evil of secret payments of indemnification which may or may not be consistent with the standards set forth in the Act. In addition, the use of corporate funds for this purpose is a legitimate matter of interest to shareholders.

Section 1621(1) requires the report to be made no later than the time notice is given for the next meeting of shareholders. Disclosure is required only of payments made in connection with suits by or in the name of the corporation; payments and advances arising out of third-party suits are not required to be reported, although proxy rules may require reporting and corporations, of course, may choose to report even if not legally required to do so. This subsection does not require reporting of indemnification payments or advances to any individual who is not a director. The required reporting covers payments and advances to directors in derivative suits made not only under sections 850-859 but also pursuant to a charter, bylaw, or other provision.

2. SHARES ISSUED FOR FUTURE SERVICES. Section 1621(2) requires reporting to shareholders of transactions in which the corporation issues shares for promissory notes. These transactions may involve dilution of the interests of shareholders and it was therefore concluded that disclosure of these transactions to the shareholders was appropriate as part of the decision (reflected in part 6) to broaden the permissible consideration for shares.

Disclosure is required only if the consideration for the issuance of shares consists in whole or in part of promissory notes; if the consideration consists solely of tangible or intangible property, or of services already performed, the transactions need not be reported. Proxy rules, however, may require reporting these transactions in some circumstances and corporations may choose to report them even though not legally required to do so.

IDAHO REPORTER'S COMMENT

The two additional requirements here for corporate reports to shareholders are new to Idaho as of the 1997 revision.

At least 28 states (including Montana, Oregon, Washington and Wyoming) have provisions substantively similar to Model Act § 1621(1), requiring reports to shareholders about indemnification-type payments to directors.

Only about 10 states (including Montana and Wyoming) have provisions directly comparable to section 1621(2), requiring reports to shareholders about issuing shares for notes.

30-1-1622. Annual report for secretary of state. — (1) Each domestic corporation, and each foreign corporation authorized to transact business in this state, shall deliver to the secretary of state for filing an annual report on a form provided by the secretary of state that sets forth:

(a) The name of the corporation and the state or country under whose law it is incorporated;

(b) The information required by section 30-405, Idaho Code;

(c) The address to which correspondence to the corporation's officers may be mailed; and

(d) The names and business addresses of its directors and its president and secretary.

(2) Information in the annual report must be current as of the date the annual report is executed on behalf of the corporation.

(3) The annual report shall be executed by one (1) of the persons identified in section 30-1-120, Idaho Code, or by another person who is authorized by the board of directors to execute the report. Execution of the annual report constitutes a representation that the person is authorized by the board of directors to execute the report.

(4) No annual report need be filed during the first year after a corporation is incorporated or authorized to transact business in this state. The first, and all subsequent annual reports shall be delivered to the secretary of state each year before the end of the month during which a domestic corporation was initially incorporated or a foreign corporation was initially authorized to transact business.

(5) If an annual report does not contain the information required by this section, the secretary of state shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the secretary of state within thirty (30) days after the effective date of notice, it is deemed to be timely filed.

(6) Annual reports may be filed electronically by domestic or foreign corporations by following the online filing instructions provided by the secretary of state.

History.

I.C., § 30-1-1622, as added by 1997, ch. 366, § 2, p. 1080; am. 1998, ch. 222, § 3, p. 744; am. 1999, ch. 210, § 1, p. 562; am. 2003, ch. 207, § 1, p. 550; am. 2005, ch. 274, § 1, p. 842; am. 2007, ch. 314, § 25, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (1)(b), which formerly read: "The address of its registered office and the name of its registered agent at that office in this state."

ABA OFFICIAL COMMENT

The requirement relating to the annual report that each corporation must submit to the secretary of state has been modified in section 1622 in an effort to make it a limited information document for use by the secretary of state, members of the general public, and shareholders. The purpose of the annual report is to show the names and business addresses of the corporation's directors and principal officers. It permits members of the general public to ascertain the identity of the corporation and communicate directly with it. It also establishes the alternative to the registered office for service of process and related matters.

The annual report is required of both domestic corporations and foreign corporations qualified to transact business in the state. The failure to file the annual report, like the failure to satisfy other mandatory requirements of the Act, is a ground for administrative dissolution or revocation of the certificate of authority to transact business.

IDAHO REPORTER'S COMMENT

The annual report required under ABA Official Text Model Act § 1622 would contain a little different information than under prior I.C. § 30-1-125. In addition, the filing period was different under old I.C. § 126. The other changes do not seem substantive. Subsections (1) and (3) have been changed from the Official Text to reflect the ongoing administrative practices in the office of the Idaho secretary of state.

With respect to penalties for noncompliance, the new Model Act provides for "administrative dissolution," as compared to the prior Idaho Code procedures for "forfeiture."

Part 17. Transition Provisions

30-1-1701. Application of chapter to existing domestic corporations. — This chapter applies to all domestic corporations in existence on the effective date of this chapter that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.

History.

I.C., § 30-1-1701, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" refers to the effective date of S.L. 1997, ch. 366, enacting the Idaho Business Corporation Act, effective July 1, 1997.

ABA OFFICIAL COMMENT

The fundamental principle underlying section 1701 is that the revised Model Act should ultimately be made fully applicable to all existing business corporations as well as to all new business corporations formed after the effective date of the new statute. It is undesirable to "grandfather" existing corporations under earlier statutes since that results in the permanent coexistence of two different and overlapping systems of corporation law, with resulting confusion. This is particularly true of the revised Model Act, which builds directly on the

experience of many years with existing corporation statutes and contains few major substantive changes.

Section 1701 applies this basic principle in its broadest sense by making the revised Act applicable as of its "effective date" (prescribed in section 1706) to all domestic corporations formed under general statutes for corporations for profit. This includes all prior general business corporation acts, but not statutes providing for not-for-profit corporations or associations, or corporations formed for the purpose of engaging in a business for which the state has provided a separate incorporation procedure.

Section 1701 applies the revised Model Act to all corporations to which that application is constitutionally permissible. In view of the universal adoption of "reservation of power" clauses in all states for more than a century, there are very few active business corporations to which this Act will not be applicable under this section.

IDAHO REPORTER'S COMMENT

This provision seems just a more efficient version of prior I.C. § 30-1-147, which as far as the Idaho reporter knows has caused no significant problems since its 1979 enactment.

30-1-1702. Application to qualified foreign corporations. — A foreign corporation authorized to transact business in this state on the effective date of this chapter is subject to this chapter but is not required to obtain a new certificate of authority to transact business under this chapter.

History.

I.C., § 30-1-1702, as added by 1997, ch. 366, § 2, p. 1080.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" refers to the effective date of S.L. 1997, ch. 366, enacting the Idaho Business Corporation Act, effective July 1, 1997.

ABA OFFICIAL COMMENT

Section 30-1-1702 makes the revised Model Act applicable on its effective date to all foreign corporations that are qualified to transact business in the state on that date. But these corporations need not refile and obtain new certificates of authority under the Act. While part 15 of the revised Model Act may change the rules applicable to foreign corporations in some states, these changes are not of a type that require a transition period. It is therefore recommended that only a single effective date be provided for the application of the Act to foreign corporations and that delayed effective dates for specific provisions in this regard are unnecessary.

IDAHO REPORTER'S COMMENT

This provision seems straightforward enough.

30-1-1703. Saving provisions. — (1) Except as provided in subsection (2) of this section, the repeal of a statute by this chapter does not affect:

(a) The operation of the statute or any action taken under it before its repeal;

(b) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued, or incurred under the statute before its repeal;

(c) Any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal;

(d) Any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed.

(2) If a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

History.
I.C., § 30-1-1703, as added by 1997, ch. 366, § 2, p. 1080.

ABA OFFICIAL COMMENT

The saving provisions of section 1703 are derived from section 25 of the Uniform Statutory Construction Act, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1965.

IDAHO REPORTER'S COMMENT

Again, the Idaho reporter sees no substantive change here. The 1997 revision did slightly modify the wording of ABA Official Text subsection (1)(b) but without any significant substantive change.

More specifically, and illustratively rather than exclusively, it was the intention of the 1997 revisers that (1) the repeal of old I.C. § 30-1-19 and 19A and their replacement by new I.C. § 30-1-621 did not affect the assessability of shares subject to assessment under prior law (see Idaho Reporter's Comment to I.C. § 30-1-621); (2) likewise, the enactment of new I.C. § 30-1-630's "opt in" provision on preemptive rights left corporations formed before July 1, 1997, whose articles of incorporation are silent on preemptive rights, governed by the "opt out" provision of prior law; and (3) the saving provisions of new I.C. § 30-1-1703 generally preserve the provisions of pre-1979 law saved by the 1979 enactment.

30-1-1704. Severability. — If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

History.
I.C., § 30-1-1704, as added by 1997, ch. 366, § 2, p. 1080.

IDAHO REPORTER'S COMMENT

Again, we have no change. Prior I.C. §30-1-151 was to the same effect.

CHAPTER 2

SALE OF FRANCHISE ON EXECUTION

30-201. Franchise may be levied upon. — For the satisfaction of any judgment against a person, firm, association, company, or corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property.

History.
R.S., § 2642; reen. R.C. & C.L., § 2778; C.S., § 4761; I.C.A., § 29-201; am. 1941, ch. 102, § 1, p. 183.

STATUTORY NOTES

Cross References.
Levy and sale under execution, § 11-301 et seq.

30-202. Purchaser to conduct business. — The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such person, firm, association, company or corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided.

History.
R.S., § 2643; reen. R.C. & C.L., § 2779; C.S., § 4762; I.C.A., § 29-202; am. 1941, ch. 102, § 2, p. 183.

30-203. Actions by purchaser. — The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the person, firm, association, company or corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same and may use the name of the person, firm, association, company, or corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had, is a bar to any subsequent action by or on behalf of the person, firm, association, company, or corporation for the same.

History.
R.S., § 2644; reen. R.C. & C.L., § 2780; C.S., § 4763; I.C.A., § 29-203; am. 1941, ch. 102, § 3, p. 183.

30-204. Effect of sale. — The person, firm, association, company, or corporation whose franchise is sold, as in this chapter provided, in all other respects retains the same powers, is bound to discharge the same duties, and is liable to the same penalties and forfeitures as before such sale.

History.
R.S., § 2645; reen. R.C. & C.L., § 2781; C.S., § 4764; I.C.A., § 29-204; am. 1941, ch. 102, § 4, p. 183.

30-205. Redemption from sale. — The person, firm, association, company, or corporation may, at any time within one (1) year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent (10%) interest thereon, but without any

allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the person, firm, association, company, or corporation, as if no such sale had been made.

History.
R.S., § 2646; reen. R.C. & C.L., § 2782; C.S., § 4765; I.C.A., § 29-205; am. 1941, ch. 102, § 5, p. 183.

30-206. Place of sale. — The sale of any franchise under execution must be made in the county in which the person, firm, association, company, or corporation has its principal place of business.

History.
R.S., § 2647; reen. R.C. & C.L., § 2783; C.S., § 4766; I.C.A., § 29-206; am. 1941, ch. 102, § 6, p. 183.

CHAPTER 3

IDAHO NONPROFIT CORPORATION ACT

SECTION.

30-3-1. Short title. — This act shall be known and may be cited as the "Idaho Nonprofit Corporation Act," and shall apply to any type of lawful nonprofit corporation formed under the provisions of this act or other laws of this state.

History.
I.C., § 30-3-1, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 1, p. 854.

STATUTORY NOTES

Prior Laws.
The following former sections were repealed by S.L. 1993, ch. 220, § 1, effective July 1, 1993:

30-301. (I.C., § 30-301, as added by 1979, ch. 159, § 3, p. 486.)

30-302. (I.C., § 30-302, as added by 1979, ch. 159, § 3, p. 486.)

30-303. (I.C., § 30-303, as added by 1979, ch. 159, § 3, p. 486.)

30-304. (I.C., § 30-304, as added by 1979, ch. 159, § 3, p. 486.)

30-305. (I.C., § 30-305, as added by 1979, ch. 159, § 3, p. 486.)

30-306. (I.C., § 30-306, as added by 1979, ch. 159, § 3, p. 486; am. 1989, ch. 240, § 1, p. 586.)

30-307. (I.C., § 30-307, as added by 1979, ch. 159, § 3, p. 486.)

30-308. (I.C., § 30-308, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 16, p. 433.)

30-308A. (I.C., § 30-308A, as added by 1980, ch. 197, § 23, p. 433.)

30-309. (I.C. § 30-309, as added by 1979, ch. 159, § 3, p. 486.)

30-310. (I.C., § 30-310, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 33, p. 433.)

30-311. (I.C., § 30-311, as added by 1979, ch. 159, § 3, p. 486.)

30-312. (I.C., § 30-312, as added by 1979, ch. 159, § 3, p. 486.)

30-313. (I.C., § 30-313, as added by 1979, ch. 159, § 3, p. 486; am. 1982, ch. 233, § 2, p. 614.)

30-314. (I.C., § 30-314, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 17, p. 433; am. 1981, ch. 226, § 5, p. 443; am. 1982, ch. 233, § 3, p. 614.)

30-315. (I.C., § 30-315, as added by 1979, ch. 159, § 3, p. 486.)

30-316. (I.C., § 30-316, as added by 1979, ch. 159, § 3, p. 486; am. 1986, ch. 178, § 1, p. 468.)

30-317. (I.C., § 30-317, as added by 1979, ch. 159, § 3, p. 486.)

30-318. (I.C., § 30-318, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 18, p. 433.)

30-319. (I.C., § 30-319, as added by 1979, ch. 159, § 3, p. 486.)

30-320. (I.C., § 30-320, as added by 1979, ch. 159, § 3, p. 486.)

30-321. (I.C., § 30-321, as added by 1979, ch. 159, § 3, p. 486.)

30-322. (I.C., § 30-322, as added by 1979, ch. 159, § 3, p. 486.)

30-323. (I.C., § 30-323, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 19, p. 433; am. 1981, ch. 226, § 6, p. 433; am. 1982, ch. 233, § 4, p. 614.)

30-324. (I.C., § 30-324, as added by 1979, ch. 159, § 3, p. 486.)

30-325. (I.C., § 30-325, as added by 1979, ch. 159, § 3, p. 486.)

30-326. (I.C., § 30-326, as added by 1979, ch. 159, § 3, p. 486.)

30-327. (I.C., § 30-327, as added by 1979, ch. 159, § 3, p. 486.)

30-328. (I.C., § 30-328, as added by 1979, ch. 159, § 3, p. 486.)

30-329. (I.C., § 30-329, as added by 1979, ch. 159, § 3, p. 486; am. 1981, ch. 49, § 3, p. 72; am. 1993, ch. 338, § 2.)

30-330. (I.C., § 30-330, as added by 1979, ch. 159, § 3, p. 486.)

30-331. (I.C., § 30-331, as added by 1979, ch. 159, § 3, p. 486.)

30-332. (I.C., § 30-332, as added by 1979, ch. 159, § 3, p. 486.)

A former version of §§ 30-301 to 30-307, which comprised C.C.P. 1881, §§ 844to 850, R.S., R.C. & C.L., §§ 5185 to 5191; C.S., §§ 7397 to 7403; I.C.A., §§ 29-301 to 29-307; am. 1945, ch. 31, §§ 1, 2, p. 38; am. 1977, ch. 252, § 6, p. 738, were repealed by S.L. 1978, ch. 60, § 1.

Another former version of §§ 30-301 to 30-306, which comprised I.C., §§ 30-301 to 30-

306, as added by 1978, ch. 60, § 2, p. 118, were repealed by S.L. 1979, ch. 105, § 1.

Compiler's Notes.

The first instance of the term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A. The second instance of "this act" refers to S.L. 1997, ch. 282, which is codified as §§ 30-3-1, 30-3-11, 30-3-17, 30-3-24, 30-3-35, 30-3-41, 30-3-55, and 30-3-143A. Probably both references should be to "this chapter," being chapter 3, title 30, Idaho Code.

JUDICIAL DECISIONS

Cited in: Kidd Island Bay Water Users Coop. Ass'n v. Miller, 136 Idaho 571, 38 P.3d 609 (2001).

30-3-2. Filing requirements. — (1) A document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing by the secretary of state.

(2) This act must require or permit filing the document in the office of the secretary of state.

(3) The document must contain the information required by this act. It may contain other information as well.

(4) The document must be typewritten or printed.

(5) The document must be in the English language. However, a corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(6) Except as otherwise permitted by section 30-3-136, Idaho Code, the document must be executed:

(a) By the presiding officer of its board of directors of a domestic or foreign corporation, its president, or by another of its officers;

(b) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(c) If the corporation is in the hands of a receiver, trustee or other court-appointed fiduciary, by that fiduciary.

(7) The person executing a document shall sign it and state beneath or opposite the signature his or her name and the capacity in which he or she signs. The document may, but need not, contain:

(a) The corporate seal;

(b) An attestation by the secretary or an assistant secretary; or

(c) An acknowledgement, verification or proof.

(8) The document must be delivered to the office of the secretary of state for filing and must be accompanied by one (1) exact or conformed copy, the correct filing fee, and any penalty required by this act or other law.

History.

I.C., § 30-3-2, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 1, p. 878; am. 2007, ch. 314, § 26, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted "except as provided in sections 30-3-32 and 30-3-124, Idaho Code" following "conformed copy" in subsection (8).

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-3. Forms. — (1) The secretary of state may prescribe, and furnish on request, forms for:

(a) A foreign corporation's application for a certificate of authority to transact business in this state;

(b) A foreign corporation's application for a certificate of withdrawal; and

(c) The annual report.

If the secretary of state so requires, use of these forms is mandatory.

(2) The secretary of state may prescribe and furnish on request forms for other documents required or permitted to be filed by this act but their use is not mandatory.

History.

I.C., § 30-3-3, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-4. Filing, service and copying fees. — The secretary of state shall collect the following fees when the documents described in these subsections are delivered for filing:

(1) Articles of incorporation $30.00
(2) Application for reserved name $20.00
(3) Notice of transfer of reserved name $20.00
(4) Application for registered name $30.00
(5) Application for renewal of registered name $30.00
(6) Amendment of articles of incorporation $30.00
(7) Restatement of articles of incorporation with amendments . . $30.00
(8) Articles of merger $30.00
(9) Articles of dissolution $30.00
(10) Application for reinstatement following administrative dissolution $30.00
(11) Application for certificate of authority $30.00
(12) Application for amended certificate of authority $30.00
(13) Application for certificate of withdrawal $20.00
(14) Certificate of revocation of authority to transact business . . . no fee
(15) Annual report .... no fee
(16) Articles of correction $20.00
(17) Certificate of existence or authorization $10.00

(18) Any other document required or permitted to be filed by this act $20.00

(19) Filing any document relating to a nonprofit corporation when the filing party requires the evidence of completion of filing to be returned within eight (8) hours, a surcharge of $20.00

History.

I.C., § 30-3-4, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 2, p. 878; am. 1999, ch. 211, § 1, p. 563; am. 2007, ch. 314, § 27, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted former subsections (6) through (8), which were the listings for the documents "Corporation's statement of change of registered agent or registered office or both," "Agent's statement of change of registered office for each affected corporation," and "Agent's statement of resignation," respectively, and redesignated the remaining subsections accordingly.

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-5. Effective date of document. — (1) Except as provided in subsection (2) of this section, a document is effective:

(a) At the time of filing on the date it is filed, as evidenced by the secretary of state's endorsement on the original document; or

(b) At a later time specified in the document as its effective time on the date it is filed.

(2) A document may specify a delayed effective time and date, and if it does so, the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the 90th day after the date filed.

History.

I.C., § 30-3-5, as added by 1993, ch. 220, § 2, p. 685.

30-3-6. Correcting filed document. — (1) A domestic or foreign corporation may correct a document filed by the secretary of state if the document:

(a) Contains an incorrect statement; or

(b) Was defectively executed, attested, sealed, verified or acknowledged.

(2) A document is corrected:

(a) By preparing articles of correction that:

(i) Describe the document (including its filing date) or attach a copy of it to the articles;

(ii) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and

(iii) Correct the incorrect statement or defective execution; and

(b) By delivering the articles of correction to the secretary of state.

(3) Articles of correction are effective on the effective date of the docu-

ment they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

History.

I.C., § 30-3-6, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

30-3-7. Filing duty of secretary of state. — (1) If a document delivered to the office of the secretary of state for filing satisfies the requirements of section 30-3-2, Idaho Code, the secretary of state shall file it.

(2) The secretary of state files a document by stamping or otherwise endorsing "Filed," together with the secretary of state's official title and the date and the time of receipt, on both the original and copy of the document and on the receipt for the filing fee. After filing a document, the secretary of state shall deliver the document copy, with the filing fee receipt, (or acknowledgement of receipt if no fee is required) attached, to the domestic or foreign corporation or its representative.

(3) Upon refusing to file a document, the secretary of state shall return it to the domestic or foreign corporation or its representative within five (5) days after the document was delivered, together with a brief, written explanation of the reason or reasons for the refusal.

(4) The secretary of state's duty to file documents under this section is ministerial. Filing or refusal to file a document does not:

(a) Affect the validity or invalidity of the document in whole or in part;

(b) Relate to the correctness or incorrectness of information contained in the document; or

(c) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

History.

I.C., § 30-3-7, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 28, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted "except as provided in sections 30-3-32 and 30-3-125, Idaho Code" following "After filing a document" in the last sentence in subsection (2).

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

30-3-8. Appeal from secretary of state's refusal to file document. — (1) If the secretary of state refuses to file a document delivered for filing

to the secretary of state's office, the domestic or foreign corporation may appeal the refusal to the district court of the county where the corporation's principal office is located, or if there is none in this state, Ada county. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the secretary of state's explanation of the refusal to file.

(2) The court may summarily order the secretary of state to file the document or take other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

History.

I.C., § 30-3-8, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 29, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation's principal office is located, or if there is none in this state, Ada county" for "corporation's principal office, or if there is none in this state, its registered office, is or will be located" in subsection (1).

30-3-9. Evidentiary effect of copy of filed document. — A certificate attached to a copy of a document bearing the secretary of state's signature, which may be in facsimile, and the seal of this state, is conclusive evidence that the original document is on file with the secretary of state.

History.

I.C., § 30-3-9, as added by 1993, ch. 220, § 2, p. 685.

30-3-10. Certificate of existence. — (1) Any person may apply to the secretary of state to furnish a certificate of existence for a domestic or foreign corporation.

(2) Subject to any qualification stated in the certificate, a certificate of existence issued by the secretary of state may be relied upon as conclusive evidence that the domestic or foreign corporation is in good standing in this state.

History.

I.C., § 30-3-10, as added by 1993, ch. 220, § 2, p. 685.

30-3-11. Definitions. — Unless the context otherwise requires in this act:

(1) "Approved by (or approval by) the members" means approved or ratified by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present, which affirmative votes also constitute a majority of the required quorum, or by a written ballot or written consent in conformity with this act or by the affirmative vote, written ballot or written consent of such greater proportion, including the votes of all the members of any class, unit or grouping as

may be provided in the articles, bylaws or this act for any specified member action.

(2) "Articles of incorporation" or "articles" includes amended and restated articles of incorporation and articles of merger.

(3) "Board" or "board of directors" means the board of directors by whatever name it is designated, except that no person or group of persons are the board of directors merely because of powers delegated to that person or group pursuant to section 30-3-63, Idaho Code.

(4) "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this act for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(5) "Class" refers to a group of memberships which have the same rights with respect to voting, dissolution, redemption and transfer. For the purpose of this section, rights shall be considered the same if they are determined by a formula applied uniformly.

(6) "Cooperative corporation" or "cooperative" means any nonprofit corporation, operating on a cooperative basis, owned, operated, organized and maintained by its members, for the purpose of providing goods or services to its members.

(7) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(8) "Directors" means individuals, designated in the articles or bylaws or elected by the incorporators, and their successors and individuals elected or appointed by any other name or title to act as members of the board.

(9) "Distribution" means the payment of a dividend or any part of the income or profit of a corporation to its members, directors or officers.

(10) "Domestic corporation" means a corporation organized under the laws of Idaho.

(11) "Effective date of notice" is defined in section 30-3-12, Idaho Code.

(12) "Employee" does not include an officer or director who is not otherwise employed by the corporation.

(13) "Entity" includes corporation and foreign corporation; business corporation and foreign business corporation; profit and nonprofit unincorporated association; corporation sole; business trust, estate, partnership, trust and two (2) or more persons having a joint or common economic interest; and state, United States; and foreign government.

(14) "File," "filed," or "filing" means filed in the office of the secretary of state.

(15) "Foreign corporation" means a corporation organized under a law other than the laws of this state which would be a nonprofit corporation if formed under the laws of this state.

(16) "Governmental subdivision" includes authority, county, district and municipality.

(17) "Includes" denotes a partial definition.

(18) "Individual" includes the estate of an incompetent individual.

(19) "Means" denotes a complete definition.

(20) "Member" shall also mean stockholder(s) or shareholder(s) wherever and whenever those terms are used in this act, and shall apply to all nonprofit corporations formed under this act or other laws of this state which have stockholders or shareholders and issue shares of stock instead of memberships.

(21) "Membership" refers to the rights and obligations a member or members have pursuant to a corporation's articles, bylaws and this act.

(22) "Notice" is defined in section 30-3-12, Idaho Code.

(23) "Person" includes any individual or entity.

(24) "Principal office" means the office, in or out of this state, so designated in the annual report filed pursuant to section 30-3-136, Idaho Code, where the principal office of a domestic or foreign corporation is located.

(25) "Proceeding" includes civil suit and criminal, administrative and investigatory action.

(26) "Record date" means the date on which a corporation determines the identity of its members for the purposes of this act.

(27) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under section 30-3-83(2), Idaho Code, for custody of the minutes of the directors' and members' meetings and for authenticating the records of the corporation.

(28) "State," when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory, and insular possession, and their agencies and governmental subdivisions, of the United States.

(29) "United States" includes district, authority, bureau, commission, department and any other agency of the United States.

(30) "Vote" includes authorization by written ballot, absentee ballot and written consent.

(31) "Voting power" means the total number of votes entitled to be cast for the election of directors at the time the determination of voting power is made, excluding a vote which is contingent upon the happening of a condition or event that has not occurred at the time. Where a class is entitled to vote as a class for directors, the determination of voting power of the class shall be based on the percentage of the number of directors the class is entitled to elect out of the total number of authorized directors.

History.

I.C., § 30-3-11, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 2, p. 854.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in the introductory paragraph and in subsections (1), (4), (21), and (26) refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A. The term "this act" in subsection (20) refers to S.L. 1997, ch. 282, which is codified as §§ 30-3-1, 30-3-11, 30-3-17, 30-3-24, 30-3-35, 30-3-41, and 30-3-143A. Probably all these references should be to "this chapter," being chapter 3, title 30, Idaho Code.

The words and the letter "s" enclosed in parentheses so appeared in the law as enacted.

30-3-12. Notice. — (1) Notice may be oral or written. Notice by electronic transmission is written notice.

(2) Notice may be communicated: in person; by telephone or voice mail; by telegraph, teletype or other electronic means; or by mail or private carrier; if these forms of personal notice are impracticable, notice may be communicated by publication for ten (10) days pursuant to section 60-109, Idaho Code.

(3) Oral notice is effective when communicated, if communicated in a comprehensible manner.

(4) Written notice, if in a comprehensible form, is effective at the earliest or the following:

(a) When received;

(b) Five (5) days after its deposit in the United States mail, as evidenced by sworn affidavit or postmark, if mailed correctly addressed and with first class postage affixed;

(c) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(d) When electronically transmitted to a member in a manner authorized by the members.

(5) Written notice is correctly addressed to a member of a domestic or foreign corporation if addressed to the member's address shown in the corporation's current list of members.

(6) A written notice or report delivered as part of a newsletter, magazine or other publication regularly sent to members shall constitute a written notice or report if addressed or delivered to the member's address shown in the corporation's current list of members, or in the case of members who are residents of the same household and who have the same address in the corporation's current list of members, if addressed or delivered to one of such members, at the address appearing on the current list of members.

(7) Written notice is correctly addressed to a domestic or foreign corporation authorized to transact business in this state, other than in its capacity as a member, if addressed to its registered agent or to its secretary at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(8) If section 30-3-50(2), Idaho Code, or any other provision of this act prescribes notice requirements for particular circumstances, those requirements govern. If articles or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this act, those requirements govern.

History.

I.C., § 30-3-12, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 3, p. 878.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-13. Private foundation. — Except where otherwise determined by a court of competent jurisdiction, a corporation that is a private foundation as defined in section 509(a) of the internal revenue code of 1986:

(1) Shall distribute such amounts for each taxable year at such time and in such manner as not to subject the corporation to tax under section 4942 of the code.

(2) Shall not engage in any act of self-dealing as defined in section 4941(d) of the code.

(3) Shall not retain any excess business holdings as defined in section 4943(c) of the code.

(4) Shall not make any taxable expenditures as defined in section 4944 of the code.

(5) Shall not make any taxable expenditures as defined in section 4945(d) of the code.

(6) Shall be authorized to terminate its status as a private foundation in a manner described in section 507(b)(1) of the code.

All references in this section to sections of the code shall be to such sections of the internal revenue code of 1986 as amended from time to time, or to corresponding provisions of subsequent internal revenue laws of the United States.

History.

I.C., § 30-3-13, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 190, § 8, p. 617.

STATUTORY NOTES

Federal References.

Sections 507(b)(1), 509(a), 4941(d), 4942, 4943(c), 4944, and 4945(d) of the Internal Revenue Code, referred to throughout this section, are compiled as 26 U.S.C.S. §§ 507(b)(1), 509(a), 4941(d), 4942, 4943(c), 4944, and 4945(d), respectively.

30-3-14. Judicial relief. — (1) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws or this act, then upon petition of a director, officer, delegate, or member, the district court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and this act, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise

apply. In a proceeding under this section the court may determine who the members or directors are.

(3) The order issued pursuant to this section may dispense with any requirements relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws or this act.

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section; provided however, that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws and this act.

(6) Any member of a cooperative association that provides electric service may apply to the district court of the county where the member's service entrance is located for a determination that the cooperative association's charges for electric service to that member are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or is discriminatory or preferential, the court shall remand the matter to the cooperative association to alter or amend the rate in conformance with the standards set forth herein.

History.

I.C., § 30-3-14, as added by 1993, ch. 220, § 2, p. 685; am. 2001, ch. 29, § 14, p. 35.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

Effective Dates.

Section 16 of S.L. 2001, ch. 29 declared an emergency. Approved February 28, 2001.

30-3-15. Religious corporations — Constitutional protections. — If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this act on the same subject, the religious doctrine shall control to the extent required by the constitution of the United States or the constitution of this state or both.

History.
I.C., § 30-3-15, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-16. Incorporators. — One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

History.
I.C., § 30-3-16, as added by 1993, ch. 220, § 2, p. 685.

30-3-17. Articles of incorporation. — (1) The articles of incorporation must set forth:

(a) A corporate name for the corporation that satisfies the requirements of section 30-3-27, Idaho Code;

(b) The purpose or purposes for which the corporation is organized, which may be, either alone or in combination with other purposes, the transaction of any lawful activity;

(c) The names and addresses of the individuals who are to serve as the initial directors;

(d) The information required by section 30-405(1), Idaho Code;

(e) The name and address of each incorporator;

(f) Whether or not the corporation will have members; and

(g) Provisions not inconsistent with law regarding the distribution of assets on dissolution.

(2) The articles of incorporation may set forth:

(a) Provisions not inconsistent with law regarding:

(i) Managing and regulating the affairs of the corporation;

(ii) Defining, limiting and regulating the powers of the corporation, its board of directors, and members or any class of members; and

(iii) The characteristics, qualifications, rights, limitations and obligations attaching to each or any class of members.

(b) Any provision that under this act is required or permitted to be set forth in the bylaws.

(3) Each incorporator named in the articles must sign the articles.

(4) The articles of incorporation need not set forth any of the corporation powers enumerated in this act.

(5) The articles of incorporation may authorize assessments to be levied upon all members or classes of membership alike, or upon the outstanding shares of stock of the corporation that issues shares of stock instead of memberships pursuant to its articles of incorporation, or in different amounts or proportions or upon a different basis upon different members or classes of membership, and may exempt some members or classes of membership from assessments. The articles of incorporation may fix the

amount and method of collection of assessments, or may authorize the board of directors to fix the amount thereof, from time to time, and may make them payable at such times or intervals, and upon such notice and by such methods as the directors may prescribe. Assessments may be made enforceable by civil action or by the forfeiture of membership, or both, or by the sale of shares of the capital stock of a stockholder in a corporation that issues shares of stock instead of memberships, when authorized by the articles of incorporation of said corporation, upon notice given in writing twenty (20) days before commencement of such action or such forfeiture. If the articles of incorporation so provide, assessments may be secured by a lien upon real property to which membership rights are appurtenant, if appropriate, or upon the shares of stock of a stockholder or shareholder corporation, when authorized by its articles of incorporation.

History.
I.C., § 30-3-17, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 295, § 1, p. 932; am. 1997, ch. 282, § 3, p. 854; am. 2007, ch. 314, § 30, p. 887.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 314, rewrote subsection (1)(d), which formerly read: "The street address of the corporation's initial registered office and the name of its initial registered agent at that office."

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-18. Incorporation. — (1) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(2) The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

History.
I.C., § 30-3-18, as added by 1993, ch. 220, § 2, p. 685.

30-3-19. Liability for preincorporation transactions. — All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this act, are jointly and severally liable for all liabilities created while so acting.

History.
I.C., § 30-3-19, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-20. Organization of corporation. — (1) After incorporation:

(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws and carrying on any other business brought before the meeting;

(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect directors and complete the organization of the incorporation; or

(ii) To elect a board of directors who shall complete the organization of the corporation.

(2) Action required or permitted by this act to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one (1) or more written consents describing the action taken and signed by each incorporator.

(3) An organizational meeting may be held in or out of this state in accordance with section 30-3-75, Idaho Code.

History.

I.C., § 30-3-20, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-21. Bylaws. — (1) The board of directors or members of a corporation shall adopt the initial bylaws for the corporation.

(2) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

(3) The patrons of a cooperative corporation, by dealing with the corporation, acknowledge that the terms and provisions of the articles of incorporation and bylaws, as well as policies, rules and regulations, shall constitute and be a contract between the corporation and each patron, and both the corporation and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions.

History.

I.C., § 30-3-21, as added by 1993, ch. 220, § 2, p. 685.

30-3-22. Emergency bylaws and powers. — (1) Unless the articles provide otherwise, the directors of a corporation may adopt, amend or repeal bylaws to be effective only in an emergency defined in subsection (4) of this section. The emergency bylaws, which are subject to amendment or repeal

by the members, may provide special procedures necessary for managing the corporation during the emergency, including:

(a) How to call a meeting of the board;

(b) Quorum requirements for the meeting; and

(c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws:

(a) Binds the corporation; and

(b) May not be used to impose liability on a corporate director, officer, employee, or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-3-22, as added by 1993, ch. 220, § 2, p. 685.

30-3-23. Purposes. — (1) Every corporation incorporated under this act has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.

(2) A corporation engaging in an activity that is subject to regulation under another statute of this state may incorporate under this act only if incorporation under this act is not prohibited by the other statute. The corporation shall be subject to all limitations of the other statute.

History.

I.C., § 30-3-23, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-24. General powers. — Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing or in any other manner reproducing it;

(3) To make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this state, for regulating and managing the affairs of the corporation;

(4) To purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real property, including water and water rights, and personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with, shares or other interests in or obligations of any entity;

(7) To make contracts and guaranties, incur liabilities, borrow money, issue notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by section 30-3-82, Idaho Code;

(9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;

(10) To conduct its activities, locate offices and exercise the powers granted by this act within or without this state;

(11) To elect or appoint directors, officers, employees and agents of the corporation, define their duties and fix their compensation;

(12) To pay pensions and establish pension plans, pension trusts and other benefit and incentive plans for any or all of its current or former directors, officers, employees and agents;

(13) To make donations not inconsistent with law for the public welfare or for charitable, religious, scientific or educational purposes and for other purposes that further the corporate interest;

(14) To impose dues, assessments, admission and transfer fees upon its members, and to levy assessments upon the outstanding shares of stock, of a corporation with capital stock, if authorized by the articles of incorporation of that corporation;

(15) To establish conditions for admission of members, admit members and issue memberships;

(16) To carry on a business;

(17) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

History.

I.C., § 30-3-24, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 4, p. 854.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-25. Emergency powers. — (1) In anticipation of or during an emergency defined in subsection (4) of this section, the board of directors of a corporation may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent; and

(b) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officer to do so.

(2) During an emergency defined in subsection (4) of this section, unless emergency bylaws provide otherwise:

(a) Notice of a meeting of the board of directors need be given only to those directors it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(b) One (1) or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith during an emergency under this section to further the ordinary affairs of the corporation:

(a) Binds the corporation; and

(b) May not be used to impose liability on a corporate director, officer, employee or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-3-25, as added by 1993, ch. 220, § 2, p. 685.

30-3-26. Ultra vires. — (1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(2) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by a director, or by a member or members in a derivative proceeding.

(3) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee or other legal representative.

History.

I.C., § 30-3-26, as added by 1993, ch. 220, § 2, p. 685.

30-3-27. Corporate name. — The corporate name:

(1) Shall contain the word "corporation," "company," "incorporated" or "limited," or shall contain an abbreviation of one (1) of such words; provided however, that if the word "company" or its abbreviation is used, it shall not be immediately preceded by the word "and" or by an abbreviation of or symbol representing the word "and."

(2) Shall not contain any word or phrase which falsely indicates or implies government affiliation or that it is organized for any purpose other

than one (1) or more of the purposes contained in its articles of incorporation.

(3) Shall be distinguishable on the records of the secretary of state from the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this act, or the name of a corporation which has, in effect, a registration of its corporate name as provided in this act, except that this provision shall not apply if the applicant files with the secretary of state either of the following:

(a) The written consent of such other corporation or holder of a reserved or registered name to use the name which is not distinguishable on the records of the secretary of state, and one (1) or more words are added to make such name distinguishable from such other name; or

(b) A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of such name in this state.

(4) A corporation with which another corporation, domestic or foreign, is merged, or which is formed by the reorganization or consolidation of one (1) or more domestic or foreign corporations or upon a sale, lease or other disposition to or exchange with, a domestic corporation of all or substantially all the assets of another corporation, domestic or foreign, including its name, may have the same name as that used in this state by any of such corporations if such other corporation was organized under the laws of, or is authorized to transact business in, this state.

(5) Nothing in this section shall abrogate or limit the law as to unfair competition or unfair practice in the use of trade names, nor derogate from the common law, the principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade names.

(6) The assumption of a name in violation of the provisions of this section shall not affect or vitiate the corporate existence, but the courts of this state, having equity jurisdiction, may, upon the application of the state, or of any person, unincorporated association, or corporation interested or affected, enjoin such corporation in violation from doing business under any name assumed in violation of the provisions of this section.

History.

I.C., § 30-3-27, as added by 1993, ch. 220, § 2, p. 685; am. 1999, ch. 212, § 3, p. 568; am. 2005, ch. 272, § 2, p. 836.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

JUDICIAL DECISIONS

Cited in: Bonner County v. Bonner County Sheriff Search & Rescue, Inc., 142 Idaho 788, 134 P.3d 639 (2006).

30-3-28. Reserved name. — The exclusive right to the use of a corporate name may be reserved by:

(1) Any person intending to organize a corporation under this act.

(2) Any domestic corporation intending to change its name.

(3) Any foreign corporation intending to make application for a certificate of authority to transact business in this state.

(4) Any foreign corporation authorized to transact business in this state and intending to change its name.

(5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this state.

The reservation shall be made by filing with the secretary of state an application to reserve a specified corporate name, executed by the applicant. If the secretary of state finds that the name is available for corporate use, he shall reserve the same for the exclusive use of the applicant for a period of four (4) months.

The right to the exclusive use of a specified corporate name so reserved may be transferred to any person or corporation by filing in the office of the secretary of state a notice of such transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee.

History.

I.C., § 30-3-28, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-29. Registered name. — Any corporation organized and existing under the laws of any state or territory of the United States may register its corporate name under this act, provided its corporate name is distinguishable on the records of the secretary of state from the name of any domestic corporation existing under the laws of this state, or the name of any foreign corporation authorized to transact business in this state, or any corporate name reserved or registered under this act.

Such registration shall be made by filing with the secretary of state:

(1) An application for registration executed by the corporation by an officer thereof, setting forth the name of the corporation, the state or territory under the laws of which it is incorporated, the date of its incorporation, a statement that it is carrying on or doing business, and a brief statement of the business in which it is engaged; and

(2) A certificate setting forth that such corporation is in good standing under the laws of the state or territory wherein it is organized, executed by the secretary of state of such state or territory or by such other official as may have custody of the records pertaining to corporations; and

(3) Paying to the secretary of state a registration fee in the amount of ten dollars ($10.00).

Such registration shall be effective until the close of the calendar year in which the application for registration is filed.

History.

I.C., § 30-3-29, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 4, p. 878; am. 1999, ch. 212, § 4, p. 563.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-30. Registered office and registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-30, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31. See § 30-401 et seq.

30-3-31. Change of registered office or registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-31, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31. See § 30-401 et seq.

30-3-32. Resignation of registered agent. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-32, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31. See § 30-401 et seq.

30-3-33. Service on corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-33, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31. See § 30-401 et seq.

30-3-34. Admission of members. — (1) The articles or bylaws may establish criteria or procedures for admission of members.

(2) No person shall be admitted as a member without his or her consent.

(3) No person who is not an incorporator shall become a member of a cooperative corporation unless such person shall agree to use services furnished by the corporation when such service shall be available through its facilities.

History.
I.C., § 30-3-34, as added by 1993, ch. 220, § 2, p. 685.

30-3-35. Consideration. — Except as provided in its articles or bylaws, a corporation may admit members for no consideration or for such consideration as is determined by the board, or by the articles of incorporation.

History.
I.C., § 30-3-35, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 5, p. 854.

30-3-36. No requirement of members. — A corporation, except a cooperative corporation, is not required to have members.

History.
I.C., § 30-3-36, as added by 1993, ch. 220, § 2, p. 685.

30-3-37. Differences in rights and obligations of members. — All members shall have the same rights and obligations with respect to voting, dissolution, redemption and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations or divide voting rights by voting districts. All members shall have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

History.
I.C., § 30-3-37, as added by 1993, ch. 220, § 2, p. 685.

30-3-38. Transfers. — Where transfer rights have been provided, no restriction on them shall be binding with respect to a member holding a membership issued prior to the adoption of the restriction unless the restriction is approved by the members and the affected member.

History.
I.C., § 30-3-38, as added by 1993, ch. 220, § 2, p. 685.

30-3-39. Member's liability to third parties. — A member of a corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.

History.
I.C., § 30-3-39, as added by 1993, ch. 220, § 2, p. 685.

30-3-40. Member's liability for dues, assessments and fees. — A member may become liable to the corporation for dues, assessments or fees.

History.
I.C., § 30-3-40, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 295, § 2, p. 932.

STATUTORY NOTES

Effective Dates.
Section 3 of S.L. 1994, ch. 295, declared an emergency and provided this act shall be in full force and effect on and after March 31, 1994, and retroactively to July 1, 1993. Approved March 31, 1994.

30-3-41. Resignation. — (1) A member may resign at any time. A person ceases to be a stockholder only when that person's shares of stock have all been disposed of.

(2) The resignation of a member, or the disposal of all stock of a stockholder, does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

(3) The provisions of title 42[, Idaho Code,] shall also apply to all resignations pursuant to this section if a company or corporation is regulated or governed pursuant to that title.

History.
I.C., § 30-3-41, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 6, p. 854.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion in subsection (3) was added by the compiler to conform to the statutory citation style.

JUDICIAL DECISIONS

Commitment made.
Members of a nonprofit water users cooperative who left the cooperative were not liable for their pro rata share of a USDA loan that had been reserved, but not yet funded, to assist the cooperative in complying with environmental quality consent orders in which it agreed to develop a new drinking water system for its members. Kidd Island Bay Water Users Coop. Ass'n v. Miller, 136 Idaho 571, 38 P.3d 609 (2001).

30-3-42. Termination, expulsion and suspension. — (1) No member, except a member of a religious corporation, may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.

(2) A procedure is fair and reasonable when either:

(a) The articles or bylaws set forth a procedure that provides:

(i) Not less than fifteen (15) days' prior written notice of the expulsion, suspension or termination and the reasons therefor; and

(ii) An opportunity for the member to be heard, orally or in writing, not less than five (5) days before the effective date of the expulsion,

suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or

(b) It is fair and reasonable taking into consideration all of the relevant facts and circumstances.

(3) Any written notice given by mail must be given by first class or certified mail sent to the last address of the member shown on the corporation's records.

(4) Any proceeding challenging an expulsion, suspension or termination, including a proceeding in which defective notice is alleged, must be commenced within one (1) year after the effective date of the expulsion, suspension or termination.

(5) A member who has been expelled or suspended may be liable to the corporation for dues, assessments or fees as a result of obligations incurred or commitments made prior to expulsion or suspension.

History.

I.C., § 30-3-42, as added by 1993, ch. 220, § 2, p. 685.

30-3-43. Purchase of memberships. — A corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of section 30-3-108, Idaho Code.

History.

I.C., § 30-3-43, as added by 1993, ch. 220, § 2, p. 685.

30-3-44. Derivative suits. — (1) A proceeding may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by:

(a) Any member or members having five percent (5%) or more of the voting power or by fifty (50) members, whichever is less; or

(b) Any director.

(2) In any such proceeding, each complainant shall be a member or director at the time of bringing the proceeding.

(3) A complaint in a proceeding brought in the right of a corporation must be verified and alleged with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

(4) On termination of the proceeding the court may require the complainants to pay any defendant's reasonable expenses, including attorney's fees, incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.

(5) If the proceeding on behalf of the corporation results in the corpora-

tion taking some action requested by the complainants or otherwise was successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise or settlement of an action or claim, the court may award the complainants reasonable expenses, including attorney's fees.

History.
I.C., § 30-3-44, as added by 1993, ch. 220, § 2, p. 685.

30-3-45. Delegates. — (1) A corporation may provide in its articles or bylaws for delegates having some or all of the authority of members.

(2) The articles or bylaws may set forth provisions relating to:

(a) The characteristics, qualifications, rights, limitations and obligations of delegates including their selection and removal;

(b) Calling, noticing, holding and conducting meetings of delegates; and

(c) Carrying on corporate activities during and between meetings of delegates.

History.
I.C., § 30-3-45, as added by 1993, ch. 220, § 2, p. 685.

30-3-46. Annual and regular meetings. — (1) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

(2) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.

(3) Annual and regular membership meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office.

(4) At the annual meeting:

(a) The president and chief financial officer shall report on the activities and financial condition of the corporation; and

(b) The members shall consider and act upon such other matters as may be raised consistent with the notice requirements of section 30-3-50, Idaho Code.

(5) At regular meetings the members shall consider and act upon such matters as may be raised consistent with the notice requirements of sections [section] 30-3-50, Idaho Code.

(6) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

History.
I.C., § 30-3-46, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertion in subsection (5) was added by the compiler to supply the intended term.

30-3-47. Special meeting. — (1) A corporation with members shall hold a special meeting of members:

(a) On call of its board or the person or persons authorized to do so by the articles or bylaws; or

(b) Except as provided in the articles or bylaws of a religious corporation if the holders of at least ten percent (10%) of the voting power of any corporation sign, date and deliver to any corporate officer one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(2) The close of business on the 30th day before delivery of the demand or demands for a special meeting to any corporate officer is the record date for the purpose of determining whether the ten percent (10%) requirement of subsection (1) of this section has been met.

(3) If a notice for a special meeting demanded under subsection (1)(b) of this section is not given pursuant to section 30-3-50, Idaho Code, within thirty (30) days after the date the written demand or demands are delivered to a corporate officer, regardless of the requirements of subsection (4) of this section, a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to section 30-3-50, Idaho Code.

(4) Special meetings of members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(5) Only those matters that are within the purpose or purposes described in the meeting notice required in section 30-3-50, Idaho Code, may be conducted at a special meeting of members.

History.
I.C., § 30-3-47, as added by 1993, ch. 220, § 2, p. 685.

30-3-48. Court-ordered meetings. — (1) The district court of the county where a corporation's principal office is located or, if none in this state, Ada county, may summarily order a meeting to be held:

(a) On application of any member or other person entitled to participate in an annual or regular meeting, if an annual meeting was not held within the earlier of six (6) months after the end of the corporation's fiscal year or fifteen (15) months after its last annual meeting; or

(b) On application of any member or other person entitled to participate in a regular meeting, if a regular meeting is not held within forty (40) days after the date it was required to be held; or

(c) On application of a member who signed a demand for a special meeting valid under section 30-3-47, Idaho Code, a person or persons entitled to call a special meeting, if:

(i) Notice of the special meeting was not given within thirty (30) days after the date the demand was delivered to a corporate officer; or

(ii) The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, specify a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(3) If the court orders a meeting, it may also order the corporation to pay the member's costs, including reasonable attorney's fees, incurred to obtain the order.

History.

I.C., § 30-3-48, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 32, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation's principal office is located or, in none in this state, Ada county" for "corporation's principal office or, if none in this state, its registered office, is located" in the introductory paragraph in subsection (1).

30-3-49. Action by written consent. — (1) Unless limited or prohibited by the articles or bylaws, action required or permitted by this act to be approved by the members may be approved without a meeting of members if the action is approved by members holding at least eighty percent (80%) of the voting power. The action must be evidenced by one (1) or more written consents describing the action taken, signed by those members representing at least eighty percent (80%) of the voting power, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) If not otherwise determined under section 30-3-48, Idaho Code, or 30-3-52, Idaho Code, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection (1) of this section.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document filed with the secretary of state.

(4) Written notice of member approval pursuant to this section shall be given to all members who have not signed the written consent. If written notice is required, member approval pursuant to this section shall be effective ten (10) days after such written notice is given.

History.

I.C., § 30-3-49, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-50. Notice of meeting. — (1) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner.

(2) Any notice that conforms to the requirements of subsection (3) of this section is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered; provided however, that notice of matters referred to in subsection (3)(b) of this section must be given as provided in subsection (3) of this section.

(3) Notice is fair and reasonable if:

(a) The corporation notifies its members of the place, date, and time of each annual, regular and special meeting of members no fewer than ten (10), or if notice is mailed by other than first class or registered mail, thirty (30), nor more than sixty (60) days before the meeting date;

(b) Notice of an annual or regular meeting includes a description of any matters or matters that must be approved by the members under section 30-3-81, 30-3-88, 30-3-91, 30-3-97, 30-3-103, 30-3-107, 30-3-112, 30-18-203, 30-18-303, 30-18-403 or 30-18-503, Idaho Code; and

(c) Notice of a special meeting includes a description of the matter or matters for which the meeting is called.

(4) Unless the bylaws require otherwise, if an annual, regular or special meeting of members is adjourned to a different date, time or place, notice need not be given of the new date, time or place, if the new date, time or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 30-3-52, Idaho Code, however, notice of the adjourned meeting must be given under this section to the members of record as of the new record date.

(5) When giving notice of an annual, regular or special meeting of members, a corporation shall give notice of a matter a member intends to raise at the meeting if:

(a) Requested in writing to do so by a person entitled to call a special meeting; and

(b) The request is received by the secretary or president of the corporation at least ten (10) days before the corporation gives notice of the meeting.

History.
I.C., § 30-3-50, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 116, § 4, p. 333.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 116, inserted the last four section references in subsection (3)(b).

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-3-51. Waiver of notice. — (1) A member may waive any notice required in this act, the articles or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the member entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) A member's attendance at a meeting:

(a) Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; or

(b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented.

History.

I.C., § 30-3-51, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-52. Record date — Determining members entitled to notice and vote. — (1) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to notice of a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date. If no such record date is fixed, members at the close of business on the business day preceding the day on which notice is given, or if notice is waived, at the close of business on the business day preceding the day on which the meeting is held, are entitled to notice of the meeting.

(2) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to vote at a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date. If no such record date is fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

(3) The bylaws may fix or provide the manner for determining a date as the record date for the purpose of determining the members entitled to exercise any rights in respect of any other lawful action. If the bylaws do not fix or provide for fixing such a record date, the board may fix in advance such a record date. If no such record date is fixed, members at the close of business on the day on which the board adopts the resolution relating thereto, or the 60th day prior to the date of such other action, whichever is later, are entitled to exercise such rights.

(4) A record date fixed under this section may not be more than seventy (70) days before the meeting or action requiring a determination of members occurs.

(5) A determination of members entitled to notice of or to vote at a membership meeting is effective for any adjournment of the meeting unless the board fixes a new date for determining the right to notice or the right to vote, which it must do if the meeting is adjourned to a date more than seventy (70) days after the record date for determining members entitled to notice of the original meeting.

(6) If a court orders a meeting adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting, it may provide that the original record date for notice or voting continues in effect or it may fix a new record date for notice or voting.

History.

I.C., § 30-3-52, as added by 1993, ch. 220, § 2, p. 685.

30-3-53. Action by mailed written ballot or absentee ballot. — (1) Unless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter. The articles or bylaws may provide that the members may vote by mail or by absentee ballot on any corporate action that may be taken at any annual, regular or special meeting of members.

(2) A written ballot for action taken without a meeting shall:

(a) Set forth each proposed action; and

(b) Provide an opportunity to vote for or against each proposed action.

(3) Approval by written ballot alone pursuant to this section when a meeting is not held shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(4) All solicitations for votes by written ballot shall:

(a) Indicate the number of responses needed to meet the quorum requirements;

(b) State the percentage of approvals necessary to approve each matter other than election of directors; and

(c) Specify the time by which a ballot must be received by the corporation in order to be counted.

(5) Except as otherwise provided in the articles or bylaws, a written ballot may not be revoked.

History.

I.C., § 30-3-53, as added by 1993, ch. 220, § 2, p. 685.

30-3-54. Members' list for meeting. — (1) After fixing a record date for a notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting. The

list must show the address and number of votes each member is entitled to vote at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting, but not entitled to notice of the meeting. This list shall be prepared on the same basis and be part of the list of members.

(2) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning two (2) business days after notice is given of the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A member, a member's agent or attorney is entitled on written demand to inspect and, subject to the limitations of sections 30-3-131(3) and 30-3-133, Idaho Code, to copy the list, at a reasonable time and at the member's expense, during the period it is available for inspection.

(3) The corporation shall make the list of members available at the meeting, and any member, a member's agent or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a member, a member's agent or attorney to inspect the list of members before or at the meeting or copy the list as permitted by subsection (2) of this section, the district court of the county where a corporation's principal office is located, or if none in this state, Ada county, on application of the member, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete and may order the corporation to pay the member's costs, including reasonable attorney's fees, incurred to obtain the order.

(5) Unless a written demand to inspect and copy a membership list has been made under subsection (2) of this section, prior to the membership meeting and a corporation improperly refuses to comply with the demand, refusal or failure to comply with this section does not affect the validity of action taken at the meeting.

(6) The articles or bylaws of a religious corporation may limit or abolish the rights of a member under this section to inspect and copy any corporate record.

History.

I.C., § 30-3-54, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 33, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation's principal office is located, or in none in this state, Ada county" for "corporation's principal office, or if none in this state its registered office, is located" in subsection (4).

30-3-55. Voting entitlement generally. — (1) Unless the articles or bylaws provide otherwise, each member is entitled to one (1) vote on each

matter voted on by the members, or by one (1) vote for each share of stock in a corporation that issues shares of stock instead of memberships, when authorized by the articles of incorporation of said corporation.

(2) Unless the articles or bylaws provide otherwise, if a membership stands of record in the names of two (2) or more persons, their acts with respect to voting shall have the following effect:

(a) If only one (1) votes, such act binds all; and

(b) If more than one (1) votes, the vote shall be divided on a pro rata basis.

History.
I.C., § 30-3-55, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 7, p. 854.

30-3-56. Quorum requirements. — (1) Unless this act, the articles or bylaws provide for a higher or lower quorum, ten percent (10%) of the votes entitled to be cast on a matter must be represented in person, by proxy, by mailed written ballot or by absentee ballot at a meeting of members to constitute a quorum on that matter.

(2) A bylaw amendment to decrease the quorum for any member action may be approved by the members or, unless prohibited by the bylaws, by the board.

(3) A bylaw amendment to increase the quorum required for any member action must be approved by the members.

(4) Unless one-third (1/3) or more of the voting power is present in person, by proxy, by mailed written ballot or by absentee ballot, the only matters that may be voted upon at an annual or regular meeting of members are those matters that are described in the meeting notice.

History.
I.C., § 30-3-56, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-57. Voting requirements. — (1) Unless this act, the articles or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of the votes represented and voting, which affirmative votes also constitute a majority of the required quorum, is the act of the members.

(2) A bylaw amendment to increase or decrease the vote required for any member action must be approved by the members.

History.
I.C., § 30-3-57, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-58. Proxies. — (1) Unless the articles or bylaws prohibit or limit proxy voting, a member may appoint a proxy to vote or otherwise act for the member by signing an appointment form either personally or by an attorney-in-fact.

(2) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for eleven (11) months unless a different period is expressly provided in the appointment form; provided however, that no proxy shall be valid for more than three (3) years from its date of execution.

(3) An appointment of a proxy is revocable by the member.

(4) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(5) Appointment of a proxy is revoked by the person appointing the proxy:

(a) Attending any meeting and voting in person; or

(b) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a written statement that the appointment of the proxy is revoked or a subsequent appointment form.

(6) Subject to section 30-3-61, Idaho Code, and any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment.

(7) The articles or bylaws of a corporation may prescribe reasonable conditions under which proxy voting may be exercised.

History.

I.C., § 30-3-58, as added by 1993, ch. 220, § 2, p. 685.

30-3-59. Cumulative voting for directors. — (1) If the articles or bylaws specifically provide for cumulative voting by members, members may so vote, by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and cast the product for a single candidate or distribute the product among two (2) or more candidates.

(2) Cumulative voting is not authorized at a particular meeting unless:

(a) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(b) A member gives notice during the meeting and before the vote is taken of the member's intent to cumulate votes, and if one (1) member gives this notice all other members participating in the election are entitled to cumulate their votes without giving further notice.

(3) A director elected by cumulative voting may be removed by the members without cause if the requirements of section 30-3-70, Idaho Code, are met unless the votes cast against removal, or not consenting in writing to such removal, would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast, or, if such action is taken by written ballot, all memberships entitled to vote were voted, and the entire number of directors authorized at the time of the director's most recent election were then being elected.

(4) Members may not cumulatively vote if the directors and members are identical.

History.
I.C., § 30-3-59, as added by 1993, ch. 220, § 2, p. 685.

30-3-60. Other methods of electing directors. — A corporation may provide in its articles or bylaws for election of directors by members or delegates:

(1) On the basis of chapter or other organizational unit;

(2) By region or other geographic unit, including voting districts and, in respect to each such voting districts the articles or bylaws shall describe the boundaries thereof and designate the number of directors that shall be elected by the members residing therein;

(3) By preferential voting; or

(4) By any other reasonable method.

History.
I.C., § 30-3-60, as added by 1993, ch. 220, § 2, p. 685.

30-3-61. Corporation's acceptance of votes. — (1) If the name signed on a vote, consent, waiver or proxy appointment corresponds to the name of a member, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member.

(2) If the name signed on a vote, consent, waiver or proxy appointment does not correspond to the record name of a member, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member if:

(a) The member is an entity and the name signed purports to be that of an officer or agent of the entity.

(b) The name signed purports to be that of an attorney-in-fact of the member and if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, waiver or proxy appointment;

(c) Two (2) or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one (1) of the coholders and the person signing appears to be acting on behalf of all the coholders; and

(d) If:

(i) The name signed purports to be that of an administrator, executor, guardian or conservator representing the member and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment;

(ii) The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment.

(3) The corporation is entitled to reject a vote, consent, waiver or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(4) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, waiver or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

(6) Contested elections shall be referred to the board of directors, which shall, after reviewing all ballots, proxies, reports of election inspectors or judges, and any other relevant documents or materials, certify the results of the election. In the case of a tie vote between candidates, the tie shall be determined by a toss of a coin. If allowed by the bylaws of the corporation, the board of directors shall have the power to call a new election if, after reviewing all relevant documents and information, the board of directors is unable to certify the results of the election.

History.
I.C., § 30-3-61, as added by 1993, ch. 220, § 2, p. 685.

30-3-62. Voting agreements. — (1) If the articles or bylaws specifically allow for voting agreements, two (2) or more members may provide for the manner in which they will vote by signing an agreement for that purpose. Such agreements may be valid for a period of up to ten (10) years.

(2) A voting agreement created under this section is specifically enforceable.

History.
I.C., § 30-3-62, as added by 1993, ch. 220, § 2, p. 685.

30-3-63. Requirement for and duties of board. — (1) Each corporation must have a board of directors.

(2) Except as provided in this act or subsection (3) of this section, all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.

(3) The articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities.

History.
I.C., § 30-3-63, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
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30-3-64. Qualifications of directors. — All directors must be individuals. If the corporation is a cooperative, all directors must be members of the corporation, provided, that unless otherwise provided in the bylaws, a person who has the right to vote on behalf of an entity which is a member of the corporation may serve as a director. The articles or bylaws may prescribe other qualifications for directors.

History.
I.C., § 30-3-64, as added by 1993, ch. 220, § 2, p. 685.

30-3-65. Number of directors. — (1) The board of directors must consist of three (3) or more individuals, with the number specified in or fixed in accordance with the articles or bylaws. Notwithstanding the foregoing, the board of directors of a religious corporation must consist of at least one (1) individual, with the number specified in or fixed in accordance with the articles or bylaws.

(2) The number of directors may be increased or decreased within the limitations contained in subsection (1) of this section from time to time by amendment to or in the manner prescribed in the articles or bylaws.

History.
I.C., § 30-3-65, as added by 1993, ch. 220, § 2, p. 685.

30-3-66. Election, designation and appointment of directors. — (1) If the corporation has members, all the directors, except the initial directors, shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or designated.

(2) If the corporation does not have members, all the directors, except the initial directors, shall be elected, appointed or designated as provided in the articles or bylaws. If no method of designation or appointment is set forth in the articles or bylaws, the directors, other than the initial directors, shall be elected by the board.

History.
I.C., § 30-3-66, as added by 1993, ch. 220, § 2, p. 685.

30-3-67. Terms of directors generally. — (1) The articles or bylaws must specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five (5) years. In the absence of any term specified in the articles or bylaws, the term of each director shall be one (1) year. Directors may be elected for successive terms.

(2) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(3) Except as provided in the articles or bylaws:

(a) The term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

(b) The term of a director filling any other vacancy expires at the end of the unexpired term that such director is filling.

(4) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors.

History.
I.C., § 30-3-67, as added by 1993, ch. 220, § 2, p. 685.

30-3-68. Staggered terms for directors. — The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

History.
I.C., § 30-3-68, as added by 1993, ch. 220, § 2, p. 685.

30-3-69. Resignation of directors. — (1) A director may resign at any time by delivering written notice to the board of directors, its presiding officer or to the president or secretary.

(2) A resignation is effective when the notice is effective unless the notice specifies a later effective date. If a resignation is made effective at a later date, the board may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

History.
I.C., § 30-3-69, as added by 1993, ch. 220, § 2, p. 685.

30-3-70. Removal of directors elected by members or directors. — (1) The members may remove one (1) or more directors elected by them without cause.

(2) If a director is elected by a class, chapter or other organizational unit or by region or other geographic grouping, the director may be removed only by the members of that class, chapter, unit or grouping.

(3) Except as provided in subsection (9) of this section, a director may be removed under subsection (1) or (2) of this section only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors.

(4) If cumulative voting is authorized, a director may not be removed if the number of votes, or if the director was elected by a class, chapter, unit or grouping of members, the number of votes of that class, chapter, unit or grouping, sufficient to elect the director under cumulative voting is voted against the director's removal.

(5) A director elected by members may be removed by the members only at a meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is removal of the director.

(6) In computing whether a director is protected from removal under subsections (2) through (4) of this section, it should be assumed that the votes against removal are cast in an election for the number of directors of the class to which the director to be removed belonged on the date of that director's election.

(7) An entire board of directors may be removed under subsections (1) through (5) of this section.

(8) A director elected by the board may be removed without cause by the vote of two-thirds (2/3) of the directors then in office or such greater number as is set forth in the articles or bylaws; provided however, that a director elected by the board to fill the vacancy of a director elected by the members may be removed without cause by the members, but not the board.

(9) If, at the beginning of a director's term on the board, the articles or bylaws provide that the director may be removed for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. The director may be removed only if a majority of the directors then in office vote for the removal.

(10) The articles or bylaws of a religious corporation may:

(a) Limit the application of this section; and

(b) Set forth the vote and procedures by which the board or any person may remove with or without cause a director elected by the members or the board.

History.

I.C., § 30-3-70, as added by 1993, ch. 220, § 2, p. 685.

30-3-71. Removal of designated or appointed directors. — (1) A designated director may be removed by an amendment to the articles or bylaws deleting or changing the designation.

(2) Appointed directors:

(a) Except as otherwise provided in the articles or bylaws, an appointed director may be removed without cause by the person appointing the director;

(b) The person removing the director shall do so by giving written notice

of the removal to the director and either the presiding officer of the board or the corporation's president or secretary; and

(c) A removal is effective when the notice is effective unless the notice specifies a future effective date.

History.
I.C., § 30-3-71, as added by 1993, ch. 220, § 2, p. 685.

30-3-72. Vacancy on board. — (1) Unless the articles or bylaws provide otherwise, and except as provided in subsections (2) and (3) of this section, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The members, if any, may fill the vacancy. If the vacant office was held by a director elected by a class, chapter or other organizational unit or by region or other geographic grouping, only members of the class, chapter, unit or grouping are entitled to vote to fill the vacancy if it is filled by the members;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Unless the articles or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(3) If a vacant office was held by a designated director, the vacancy shall be filled as provided in the articles or bylaws. In the absence of an applicable article or bylaw provision, the vacancy may not be filled by the board.

(4) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 30-3-69(2), Idaho Code, or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

History.
I.C., § 30-3-72, as added by 1993, ch. 220, § 2, p. 685.

30-3-73. Compensation of directors. — Unless the articles or bylaws provide otherwise, a board of directors may fix the compensation, fees, insurance or benefits, if any, of directors.

History.
I.C., § 30-3-73, as added by 1993, ch. 220, § 2, p. 685.

30-3-74. Regular and special meetings. — (1) If the time and place of a directors' meeting is fixed by the bylaws or the board, the meeting is a regular meeting. All other meetings are special meetings.

(2) A board of directors may hold regular or special meetings in or out of this state.

(3) Unless the articles or bylaws provide otherwise, a board may permit

any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

History.
I.C., § 30-3-74, as added by 1993, ch. 220, § 2, p. 685.

30-3-75. Action without meeting. — (1) Unless the articles or bylaws provide otherwise, action required or permitted by this act to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one (1) or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

(2) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

History.
I.C., § 30-3-75, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

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30-3-76. Call and notice of meetings. — (1) Unless the articles, bylaws or subsection (3) of this section provide otherwise, regular meetings of the board may be held without notice.

(2) Unless the articles, bylaws or subsection (3) of this section provide otherwise, special meetings of the board must be preceded by at least two (2) days' notice to each director of the date, time, and place, but not the purpose, of the meeting.

(3) In corporations without members any board action to remove a director or to approve a matter that would require approval by the members if the corporation had members, shall not be valid unless each director is given at least seven (7) days' written notice that the matter will be voted upon at a directors' meeting or unless notice is waived pursuant to section 30-3-77, Idaho Code.

(4) Unless the articles or bylaws provide otherwise, the presiding officer of the board, the president or twenty percent (20%) of the directors then in office may call and give notice of a meeting of the board.

History.
I.C., § 30-3-76, as added by 1993, ch. 220, § 2, p. 685.

30-3-77. Waiver of notice. — (1) A director may, at any time before, during or after the meeting, waive any notice required by this act, the articles or bylaws. Except as provided in subsection (2) of this section, the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or the corporate records.

(2) A director's attendance at or participation in a meeting waives any required notice of the meeting unless the director upon arriving at the meeting or prior to the vote on a matter not noticed in conformity with this act, the articles or bylaws objects to lack of notice and does not thereafter vote for or assent to the objected to action.

History.
I.C., § 30-3-77, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

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30-3-78. Quorum and voting. — (1) Except as otherwise provided in this act, the articles or bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. In no event may the articles or bylaws authorize a quorum of fewer than the greater of one-third (1/3) of the number of directors in office or two (2) directors.

(2) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless this act, the articles or bylaws require the vote of a greater number of directors.

History.
I.C., § 30-3-78, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
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30-3-79. Committees of the board. — (1) Unless prohibited or limited by the articles or bylaws, a board of directors may create one (1) or more committees of the board and appoint members of the board to serve on them. Each committee shall have two (2) or more directors, who serve at the pleasure of the board.

(2) The creation of a committee and appointment of members to it must be approved by the greater of:

(a) A majority of all the directors in office when the action is taken; or

(b) The number of directors required by the articles or bylaws to take action under section 30-3-78, Idaho Code.

(3) Sections 30-3-74 through 30-3-78, Idaho Code, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board, apply to committees of the board and their members as well.

(4) To the extent specified by the board of directors or in the articles or bylaws, each committee of the board may exercise the board's authority under section 30-3-63, Idaho Code.

(5) A committee of the board may not, however:

(a) Authorize distributions;

(b) Approve or recommend to members dissolution, merger or the sale, pledge or transfer of all or substantially all of the corporation's assets;

(c) Elect, appoint or remove directors or fill vacancies on the board or on any of its committees; or

(d) Adopt, amend or repeal the articles or bylaws.

(6) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 30-3-80, Idaho Code.

History.

I.C., § 30-3-79, as added by 1993, ch. 220, § 2, p. 685.

30-3-80. General standards for directors. — (1) A director shall discharge his duties as a director, including his duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) In discharging his duties, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(c) A committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(d) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence

and whom the director believes to be reliable and competent in the matters presented.

(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

(5) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property.

History.

I.C., § 30-3-80, as added by 1993, ch. 220, § 2, p. 685.

30-3-81. Director — Conflict of interest. — (1) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair at the time it was entered into or is approved as provided in subsection (2) of this section.

(2) A transaction in which a director of a corporation has a conflict of interest may be approved if:

(a) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved or ratified the transaction; or

(b) The material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved or ratified the transaction.

(3) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(a) Another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(b) Another entity of which the director is a director, officer or trustee is a party to the transaction.

(4) For purposes of subsection (2) of this section, a conflict of interest transaction is authorized, approved or ratified, if it receives the affirmative vote of a majority of the directors on the board or on the committee, who have no direct or indirect interest in the transaction. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (2)(a) of this section if the transaction is otherwise approved as provided in subsection (2) of this section.

(5) For purposes of subsection (2)(b) of this section, a conflict of interest transaction is authorized, approved or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subsection (c)(1) [(3)(a)] of this section, may not be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under subsection (3)(a) of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this act. A majority of the voting power, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(6) The articles, bylaws or a resolution of the board may impose additional requirements on conflict of interest transactions.

History.

I.C., § 30-3-81, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

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The bracketed insertion in subsection (5) was added by the compiler to correct the statutory reference.

30-3-82. Loans to or guarantees for directors and officers. — (1) Except with regard to loan or guarantee programs available to all members, a corporation may not lend money to or guarantee the obligation of a director or officer of the corporation, provided that a cooperative corporation may lend money to or guarantee the obligation of a director or officer with regard to loan or guarantee programs available to all members.

(2) The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan.

History.

I.C., § 30-3-82, as added by 1993, ch. 220, § 2, p. 685.

30-3-83. Required officers. — (1) Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer and such other officers as are appointed by the board. Except in the case of religious corporations, any two (2) or more offices may be held by the same person, except the offices of president and secretary. A religious corporation is not required to have officers.

(2) The bylaws or the board shall delegate to one (1) of the officers responsibility for preparing minutes of the directors' and members' meetings and for authenticating records of the corporation.

(3) The same individual may simultaneously hold more than one (1) office in a corporation.

History.
I.C., § 30-3-83, as added by 1993, ch. 220, § 2, p. 685.

30-3-84. Duties and authority of officers. — Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed in a resolution of the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers.

History.
I.C., § 30-3-84, as added by 1993, ch. 220, § 2, p. 685.

30-3-85. Standards of conduct for officers. — (1) An officer with discretionary authority shall discharge his duties under that authority:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.

(2) In discharging his duties an officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One (1) or more officers or employees of the corporation who the officer reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the officer reasonably believes are within the person's professional or expert competence; or

(c) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the officer believes justify reliance and confidence and who the officer believes to be reliable and competent in the matters presented.

(4) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(5) An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section.

History.
I.C., § 30-3-85, as added by 1993, ch. 220, § 2, p. 685.

30-3-86. Resignation and removal of officers. — (1) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is effective unless the notice specifies a future

effective date. If a resignation is made effective at a future date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

(2) A board may remove any officer at any time with or without cause.

History.
I.C., § 30-3-86, as added by 1993, ch. 220, § 2, p. 685.

30-3-87. Officers' authority to execute documents. — Any contract or other instrument in writing executed or entered into between a corporation and any other person is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other person that the signing officers had no authority to execute the contract or other instrument if it is signed by any two (2) officers in category 1 below or by one (1) officer in category 1 below and one (1) officer in category 2 below.

Category 1 — The presiding officer of the board and the president.

Category 2 — A vice president, the secretary, treasurer and executive director.

History.
I.C., § 30-3-87, as added by 1993, ch. 220, § 2, p. 685.

30-3-88. Indemnification of officers, directors, employees and agents. — (1) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(2) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a

judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(3) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection (1) or (2) of this section, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection herewith.

(4) Any determination under subsections (1) or (2) of this section, unless ordered by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsection (1) or (2) of this section. Such determination shall be made:

(a) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding; or

(b) If such quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(c) By the members.

(5) Expenses, including attorneys' fees, incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation as authorized in this section.

(6) The indemnification and advancement of expenses provided by, or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of shareholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(7) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent

of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section; provided that credit unions chartered under the laws of the state of Idaho may provide indemnification only by insurance.

(8) For the purposes of this section, the term "corporation" includes, in addition to the resulting corporation, all constituent corporations and their predecessors absorbed in a consolidation or merger, which, if separate existence had continued, would have had power and authority to indemnify its directors, officers, employees or agents.

(9) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, and personal representatives of such a person.

History.
I.C., § 30-3-88, as added by 1993, ch. 220, § 2, p. 685.

30-3-89. Authority to amend articles. — A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles is determined as of the effective date of the amendment.

History.
I.C., § 30-3-89, as added by 1993, ch. 220, § 2, p. 685.

30-3-90. Amendment of articles by directors. — (1) Unless the articles provide otherwise, a corporation's board of directors may adopt one (1) or more amendments to the corporation's articles without member approval:

(a) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(b) To delete the names and addresses of the initial directors;

(c) To change the information required by section 30-405(1), Idaho Code;

(d) To change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution to the name; or

(e) To make any other change expressly permitted by this act to be made by director action.

(2) If a corporation has no members, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one (1) or more amendments to the corporation's articles subject to any approval

required pursuant to section 30-3-99, Idaho Code. The corporation shall provide notice of any meeting at which an amendment is to be voted upon. The notice shall be in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider a proposed amendment to the articles and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment must be approved by a majority of the directors in office at the time the amendment is adopted.

History.

I.C., § 30-3-90, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 34, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (1)(c), which formerly read: "To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state"; and updated the first section reference in subsection (2).

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-91. Amendment of articles by directors and members. — (1) Unless this act, the articles, bylaws, the members, acting pursuant to subsection (2) of this section, or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, an amendment to a corporation's articles to be adopted must be approved:

(a) By the board, if the amendment does not relate to the number of directors, the composition of the board, the term of office of directors, or the method or way in which directors are elected or selected;

(b) Except as provided in section 30-3-90(1), Idaho Code, by the members by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in this section.

(2) The members may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(3) If the board initiates an amendment to the articles or board approval is required in subsection (1) of this section to adopt an amendment to the articles, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or any other basis.

(4) If the board or the members seek to have the amendment approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in writing in accordance with section 30-3-50, Idaho Code. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(5) If the board or the members seek to have the amendment approved by the members by written consent or written ballot or absentee ballot, the

material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment.

History.
I.C., § 30-3-91, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-92. Class voting by members on amendments to articles. — (1) The members of a class in a corporation are entitled to vote as a class on a proposed amendment to the articles if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer by changing the rights, privileges, preferences, restrictions or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification or termination of the memberships of that class; or

(f) Authorize a new class of memberships.

(2) The members of a class of a religious corporation are entitled to vote as a class on a proposed amendment to the articles only if a class vote is provided for in the articles or bylaws.

(3) If a class is to be divided into two (2) or more classes as a result of an amendment to the articles of a corporation, the amendment must be approved by the members of each class that would be created by the amendment.

(4) Except as provided in the articles or bylaws of a religious corporation, if a class vote is required to approve an amendment to the articles of a corporation, the amendment must be approved by the members of the class by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(5) A class of members of a corporation, except a religious corporation, is entitled to the voting rights granted in this section although the articles and bylaws provide that the class may not vote on the proposed amendment.

History.
I.C., § 30-3-92, as added by 1993, ch. 220, § 2, p. 685.

30-3-93. Articles of amendment. — A corporation amending its articles shall deliver to the secretary of state articles of amendment setting forth:

(1) The name of the corporation;

(2) The text of each amendment adopted;

(3) The date of each amendment's adoption;

(4) If approval of members was not required, a statement to that effect and a statement that the amendment was approved by a sufficient vote of the board of directors or incorporators;

(5) If approval by members was required:

(a) The designation, number of memberships outstanding, number of votes entitled to be cast by each class entitled to vote separately on the amendment, and number of votes of each class indisputably voting on the amendment; and

(b) Either the total number of votes cast for and against the amendment by each class entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each class and a statement that the number cast for the amendment by each class was sufficient for approval by that class.

(6) If approval of the amendment by some person or persons other than the members, the board or the incorporators is required pursuant[,] to section 30-3-99, Idaho Code, a statement that the approval was obtained.

History.

I.C., § 30-3-93, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The comma following "is required pursuant" in subsection (6) was enclosed in brackets to signify that it was inadvertently included in the enacting legislation.

30-3-94. Restated articles of incorporation. — (1) A corporation's board of directors may restate its articles of incorporation at any time with or without approval by members or any other person.

(2) The restatement may include one (1) or more amendments to the articles. If the restatement includes an amendment requiring approval by the members or any other person, it must be adopted as provided in section 30-3-91, Idaho Code.

(3) If the restatement includes an amendment requiring approval by members, the board must submit the restatement to the members for their approval.

(4) If the board seeks to have the restatement approved by the members at a membership meeting, the corporation shall notify each of its members of the proposed membership meeting in writing in accordance with section 30-3-50, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(5) If the board seeks to have the restatement approved by the members by written ballot or written consent, the material soliciting the approval shall contain or be accompanied by a copy or summary of the restatement

that identifies any amendments or other change it would make in the articles.

(6) A restatement requiring approval by the members must be approved by the same vote as an amendment to articles under section 30-3-91, Idaho Code.

(7) If the restatement includes an amendment requiring approval pursuant to section 30-3-99, Idaho Code, the board must submit the restatement for such approval.

(8) A corporation restating its articles shall deliver to the secretary of state articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(a) Whether the restatement contains an amendment to the articles requiring approval by the members or any other person other than the board of directors and, if it does not, that the board of directors adopted the restatement; or

(b) If the restatement contains an amendment to the articles requiring approval by the members, the information required by section 30-3-93, Idaho Code; and

(c) If the restatement contains an amendment to the articles requiring approval by a person whose approval is required pursuant to section 30-3-99, Idaho Code, a statement that such approval was obtained.

(9) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(10) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect.

History.

I.C., § 30-3-94, as added by 1993, ch. 220, § 2, p. 685.

30-3-95. Effect of amendment and restatement of articles. — An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

History.

I.C., § 30-3-95, as added by 1993, ch. 220, § 2, p. 685.

30-3-96. Amendment of bylaws by directors. — If a corporation has no members, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one (1) or more amendments to the corporation's bylaws subject to any approval required pursuant to section 30-3-99, Idaho Code. The corporation shall provide notice of any

meeting of directors at which an amendment is to be approved. The notice shall be in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider a proposed amendment to the bylaws and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment must be approved by a majority of the directors in office at the time the amendment is adopted.

History.
I.C., § 30-3-96, as added by 1993, ch. 220, § 2, p. 685.

30-3-97. Amendment of bylaws by directors and members. — (1) Unless the articles or bylaws provide otherwise, an amendment to a corporation's bylaws to be adopted must be approved:

(a) By a simple majority of the board;

(b) By the members by a simple majority of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-3-99, Idaho Code.

(2) If the board initiates an amendment to the bylaws or board approval is required to adopt an amendment to the bylaws, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(3) If the board or the members seek to have the amendment approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in writing in accordance with section 30-3-50, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(4) If the board or the members seek to have the amendment approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment.

History.
I.C., § 30-3-97, as added by 1993, ch. 220, § 2, p. 685.

30-3-98. Class voting by members on amendments to bylaws. — (1) If the members of a class in a corporation are entitled to vote as a class on amendments to the bylaws, they may vote as a class on a proposed amendment to the bylaws if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer by changing the rights, privileges, preferences, restrictions or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification or termination of all or part of the memberships of that class; or

(f) Authorize a new class of memberships.

(2) The members of a class of a religious corporation are entitled to vote as a class on a proposed amendment to the bylaws only if a class vote is provided for in the articles or bylaws.

(3) If a class is to be divided into two (2) or more classes as a result of an amendment to the bylaws, the amendment must be approved by the members of each class that would be created by the amendment; and

(4) If a class vote is required to approve an amendment to the bylaws, the amendment must be approved by the members of the class by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(5) A class of members is entitled to the voting rights granted by this section although the articles and bylaws provide that the class may not vote on the proposed amendment.

History.

I.C., § 30-3-98, as added by 1993, ch. 220, § 2, p. 685.

30-3-99. Approval by third persons. — The articles may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board. Such an article provision may only be amended with the approval in writing of such person or persons.

History.

I.C., § 30-3-99, as added by 1993, ch. 220, § 2, p. 685.

30-3-100. Approval of plan of merger. — (1) One (1) or more nonprofit corporations may merge into a business or nonprofit corporation, if the plan of merger is approved as provided in section 30-3-101, Idaho Code.

(2) The plan of merger must set forth:

(a) The name of each corporation planning to merge and the name of the surviving corporation into which each plans to merge;

(b) The terms and conditions of the planned merger;

(c) The manner and basis, if any, of converting memberships of each merging corporation into memberships, obligations or securities of the surviving or any other corporation or into cash or other property in whole or part.

(3) The plan of merger may set forth:

(a) Any amendments to the articles of incorporation or bylaws of the surviving corporation to be effected by the planned merger; and

(b) Other provisions relating to the planned merger.

History.
I.C., § 30-3-100, as added by 1993, ch. 220, § 2, p. 685.

30-3-100A. Applicability of Idaho entity transactions act. — (1) Unless the participating entity is excluded therefrom by section 30-18-110, Idaho Code, and except as provided in subsection (2) of this section, a merger in which a nonprofit corporation is a party is governed by the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

(2) Section 30-3-101, Idaho Code, applies to transactions in which a nonprofit corporation is a party under the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

History.
I.C., § 30-3-100A, as added by 2007, ch. 116, § 5, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-3-101. Action on plan by board, members and third persons. — (1) Unless this act, the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, a plan of merger to be adopted must be approved:

(a) By the board;

(b) By the members, if any, by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-3-99, Idaho Code, for an amendment to the articles or bylaws.

(2) If the corporation does not have members, the merger must be approved by a majority of the directors in office at the time the merger is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed merger.

(3) The board may condition its submission of the proposed merger, and the members may condition their approval of the merger, on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have the plan approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-3-50, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall

include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(5) If the board seeks to have the plan approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(6) Voting by a class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation or bylaws, would entitle the class of members to vote as a class on the proposed amendment under section 30-3-92 or 30-3-98, Idaho Code. The plan is approved by a class of members by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(7) After a merger is adopted, and at any time before articles of merger are filed, the planned merger may be abandoned, subject to any contractual rights, without further action by members or other persons who approved the plan in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the board of directors.

History.
I.C., § 30-3-101, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-102. Articles of merger. — After a plan of merger is approved by the board of directors, and if required in section 30-3-101, Idaho Code, by the members and any other persons, the surviving or acquiring corporation shall deliver to the secretary of state articles of merger setting forth:

(1) The plan of merger;

(2) If approval of members was not required, a statement to that effect and a statement that the plan was approved by a sufficient vote of the board of directors;

(3) If approval by members was required:

(a) The designation, number of members outstanding, number of votes entitled to be cast by each class entitled to vote separately on the plan, and number of votes of each class indisputably voting on the plan; and

(b) Either the total number of votes cast for and against the plan by each class entitled to vote separately on the plan or the total number of undisputed votes cast for the plan by each class and a statement that the

number cast for the plan by each class was sufficient for approval by that class.

(4) If approval of the plan by some person or persons other than the members or the board is required pursuant to section 30-3-101(1)(c), Idaho Code, a statement that the approval was obtained.

History.
I.C., § 30-3-102, as added by 1993, ch. 220, § 2, p. 685.

30-3-103. Effect of merger. — When a merger takes effect:

(1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger;

(3) The surviving corporation has all liabilities and obligations of each corporation party to the merger;

(4) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased; and

(5) The articles of incorporation and bylaws of the surviving corporation are amended to the extent provided in the plan of merger.

History.
I.C., § 30-3-103, as added by 1993, ch. 220, § 2, p. 685.

30-3-104. Merger with foreign corporation. — (1) One (1) or more foreign business or nonprofit corporations may merge with one (1) or more domestic nonprofit corporations if:

(a) The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(b) The foreign corporation complies with section 30-3-102, Idaho Code, if it is the surviving corporation of the merger; and

(c) Each domestic nonprofit corporation complies with the applicable provisions of sections 30-3-99 and 30-3-101, Idaho Code, and, if it is the surviving corporation of the merger, with section 30-3-102, Idaho Code.

(2) Upon the merger taking effect, the surviving foreign business or nonprofit corporation may be served with process in any proceeding brought against it as provided in section 30-413, Idaho Code.

History.
I.C., § 30-3-104, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 35, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "corporation may be served with process in any proceeding brought against it as provided in section 30-413, Idaho Code" for "corporation is deemed to have irrevocably appointed the secretary of state as its agent for service of process in any proceeding brought against it" in subsection (2).

30-3-105. Bequests, devises and gifts. — Any bequest, devise, gift, grant or promise contained in a will or other instrument of donation, subscription, or conveyance, that is made to a constituent corporation and that takes effect or remains payable after the merger, inures to the surviving corporation unless the will or other instrument otherwise specifically provides.

History.

I.C., § 30-3-105, as added by 1993, ch. 220, § 2, p. 685.

30-3-106. Sale of assets in regular course of activities and mortgage of assets. — (1) A corporation may on the terms and conditions and for the consideration determined by the board of directors:

(a) Sell, lease, exchange or otherwise dispose of all, or substantially all, of its property in the usual and regular course of its activities; or

(b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of its activities.

(2) Unless the articles require it, approval of the members or any other person of a transaction described in subsection (1) of this section is not required.

History.

I.C., § 30-3-106, as added by 1993, ch. 220, § 2, p. 685.

30-3-107. Sale of assets other than in regular course of activities. — (1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, with or without the goodwill, other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation's board if the proposed transaction is authorized in subsection (2) of this section.

(2) Unless this act, the articles, bylaws or the board of directors or members, acting pursuant to subsection (4) of this section, require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

(a) By the board;

(b) By the members by a simple majority of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-3-50, Idaho Code, for an amendment to the articles or bylaws.

(3) If the corporation does not have members the transaction must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the sale, lease, exchange or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(4) The board may condition its submission of the proposed transaction, and the members may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(5) If the corporation seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-3-50, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(6) If the board needs to have the transaction approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of a description of the transaction.

(7) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further action by the members or any other person who approved the transaction in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors.

History.

I.C., § 30-3-107, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-108. Prohibited distributions. — Except as authorized in section 30-3-109, Idaho Code, a corporation shall not make any distributions.

History.

I.C., § 30-3-108, as added by 1993, ch. 220, § 2, p. 685.

30-3-109. Authorized distributions. — (1) Corporations may make distributions upon dissolution in conformity with section 30-3-114 or 30-3-115, Idaho Code.

(2) The operations of a corporation which is a cooperative corporation shall be so conducted that all members will, through their membership, furnish capital for the corporation as provided in the corporation's bylaws. No interest or dividends shall be paid or payable by the corporation on any capital furnished by its members. The corporation is obligated to account on a membership basis to all its members for all amounts received and receivable from the furnishing of service and from other sources in excess of operating costs and expenses properly chargeable against the furnishing of service. The corporation is obligated to pay by credits to a capital account for each member all such amounts in excess of operating costs and expenses. The books and records of the corporation shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each member is clearly reflected and credited in an appropriate record to the capital account of each member.

In the event of dissolution or liquidation of the corporation, after all outstanding indebtedness of the corporation shall have been paid, outstanding capital credits shall be retired without priority on a pro rata basis before any payments are made on account of property rights of members.

If, at any time prior to dissolution or liquidation, the board shall determine that the financial condition of the corporation will not be impaired thereby, the capital credited to member's accounts may be retired in full or in part.

History.
I.C., § 30-3-109, as added by 1993, ch. 220, § 2, p. 685.

30-3-110. Dissolution by incorporators or directors and third persons. — (1) A majority of the incorporators or directors of a corporation that has no members may, prior to the organization meeting of directors and subject to any approval required by the articles or bylaws, dissolve the corporation by delivering to the secretary of state articles of dissolution.

(2) The corporation shall give notice of any meeting at which dissolution will be approved. The notice shall be in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolution of the corporation.

(3) The incorporators or directors in approving dissolution shall adopt a plan of dissolution indicating to whom the assets owned or held by the corporation will be distributed after all creditors have been paid.

History.
I.C., § 30-3-110, as added by 1993, ch. 220, § 2, p. 685.

30-3-111. Dissolution by directors, members and third persons. — (1) Unless this act, the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, dissolution is authorized if it is approved:

(a) By the board;

(b) By the members, if any, by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-3-99, Idaho Code, for an amendment to the articles or bylaws.

(2) If the corporation does not have members, dissolution must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-3-76(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolution of the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(3) The board may condition its submission of the proposed dissolution, and the members may condition their approval of the dissolution on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have dissolution approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-3-50, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolving the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(5) If the board seeks to have dissolution approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan of dissolution.

(6) The plan of dissolution shall indicate to whom the assets owned or held by the corporation will be distributed after all creditors have been paid.

History.

I.C., § 30-3-111, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-112. Articles of dissolution. — (1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state articles of dissolution setting forth:

(a) The name of the corporation;

(b) The date dissolution was authorized;

(c) A statement that dissolution was approved by a sufficient vote of the board;

(d) If approval of members was not required, a statement to that effect and a statement that dissolution was approved by a sufficient vote of the board of directors or incorporators;

(e) If approval by members was required:

(i) The designation, number of memberships outstanding, number of

votes entitled to be cast by each class entitled to vote separately on dissolution, and number of votes of each class indisputably voting on dissolution; and

(ii) Either the total number of votes cast for and against dissolution by each class entitled to vote separately on dissolution or the total number of undisputed votes cast for dissolution by each class and a statement that the number cast for dissolution by each class was sufficient for approval by that class.

(f) If approval of dissolution by some person or persons other than the members, the board or the incorporators is required pursuant to section 30-3-111(1)(c), Idaho Code, a statement that the approval was obtained; [and]

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

History.

I.C., § 30-3-112, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The brackets were placed around the term "and" at the end of paragraph (1)(f) by the compiler, as that term probably should have appeared at the end of paragraph (1)(e) in the enacting legislation.

30-3-113. Effect of dissolution. — (1) A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs, including:

(a) Preserving and protecting its assets and minimizing its liabilities;

(b) Discharging or making provision for discharging its liabilities and obligations;

(c) Disposing of its properties that will not be distributed in kind;

(d) Returning, transferring or conveying assets held by the corporation upon a condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;

(e) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws;

(f) If no provision has been made in its articles or bylaws for distribution of assets on dissolution, it may transfer, subject to any contractual or legal requirement, its assets:

(i) To one (1) or more persons described in section 501(c)(3) of the internal revenue code; or

(ii) To its members or, if it has no members, to those persons whom the corporation holds itself out as benefitting or serving; and

(g) Doing every other act necessary to wind up and liquidate its assets and affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Subject its directors or officers to standards of conduct different from those prescribed in sections 30-3-80 and 30-3-85, Idaho Code;
(c) Change quorum or voting requirements for its board or members; change provisions for selection, resignation or removal of its directors or officers or both; or change provisions for amending its bylaws;
(d) Prevent commencement of a proceeding by or against the corporation in its corporate name;
(e) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
(f) Terminate the authority of the registered agent.

History.
I.C., § 30-3-113, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Federal References.
Section 501(c)(3) of the Internal Revenue Code, referred to in subdivision (1)(f)(i), is compiled as 26 U.S.C.S. § 501(c)(3).

JUDICIAL DECISIONS

Cited in: Ward v. Portneuf Med. Ctr., Inc., 150 Idaho 501, 248 P.3d 1236 (2011).

30-3-114. Known claims against dissolved corporation. — (1) The directors of a dissolved corporation may dispose of the known claims against it by following the procedure described in this section.
(2) The directors of a dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must:
(a) Describe information that must be included in a claim;
(b) Provide a mailing address where a claim may be sent;
(c) State the deadline, which may not be fewer than one hundred twenty (120) days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and
(d) State that the claim will be barred if not received by the deadline.
(3) A claim against the dissolved corporation is barred:
(a) If a claimant who was given written notice under subsection (2) of this section does not deliver the claim to the dissolved corporation by the deadline;
(b) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within ninety (90) days from the effective date of the rejection notice.
(4) For purposes of this section "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

History.
I.C., § 30-3-114, as added by 1993, ch. 220, § 2, p. 685.

30-3-115. Unknown claims against dissolved corporation. — (1) The directors of a dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(2) The notice must:

(a) Be published one (1) time in a newspaper of general circulation in the county where the dissolved corporation's principal office is or was located, or, if none in this state, in Ada county;

(b) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(c) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five (5) years after publication of the notice.

(3) If the directors of a dissolved corporation publish a newspaper notice in accordance with subsection (2) of this section, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five (5) years after the publication date of the newspaper notice:

(a) A claimant who did not receive written notice under section 30-3-114, Idaho Code;

(b) A claimant whose claim was timely sent to the dissolved corporation but not acted on; and

(c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) A claim may be enforced under this section:

(a) Against the dissolved corporation to the extent of its undistributed assets; or

(b) If the assets have been distributed in liquidation, against any person, other than a creditor of the corporation, to whom the corporation distributed its property to the extent of the distributee's pro rata share of the claim or the corporate assets distributed to such person in liquidation, whichever is less, but the distributee's total liability for all claims under this section may not exceed the total amount of assets distributed to the distributee.

History.
I.C., § 30-3-115, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 36, p. 887.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 314, substituted "corporation's principal office is or was located, or, if none in this state, in Ada county" for "corporation's principal office, or, if none in this state, its registered office, is or was last located" in subsection (2)(a).

30-3-115A. Grounds for administrative dissolution. — The secretary of state may administratively dissolve a corporation under section 30-3-115B, Idaho Code, if:

(1) The corporation does not deliver its annual report to the secretary of state by the date on which it is due;

(2) The corporation is without a registered agent in this state for sixty (60) days or more;

(3) The secretary of state has credible information that the corporation has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent has been changed or that its registered agent has resigned; or

(4) The corporation's period of duration stated in its articles of incorporation expires.

History.

I.C., § 30-3-115A, as added by 1998, ch. 267, § 5, p. 878; am. 2007, ch. 314, § 37, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsection (2), deleted "or registered office" following "agent"; and in subsection (3), deleted "or registered office" following the first occurrence of "agent" and "or that its registered office has been discontinued" from the end.

30-3-115B. Procedure for and effect of administrative dissolution. — (1) If the secretary of state determines that one (1) or more grounds exist under section 30-3-115A, Idaho Code, for dissolving a corporation, he shall give notice of his determination to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered agent.

(2) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty (60) days after receipt of the notice of determination, the secretary of state shall administratively dissolve the corporation by noting the fact of dissolution and the effective date thereof in his records. The secretary of state shall give notice of the dissolution to the corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the corporation has not yet filed an annual report, to its registered agent.

(3) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 30-3-113, Idaho Code, and notify claimants under sections 30-3-114 and 30-3-115, Idaho Code.

(4) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

History.

I.C., § 30-3-115B, as added by 1998, ch. 267, § 6, p. 878; am. 2007, ch. 314, § 38, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, substituted "agent" for "office" at the end of subsection (1).

30-3-115C. Reinstatement following administrative dissolution. — (1) A corporation administratively dissolved under section 30-3-115B, Idaho Code, may apply to the secretary of state for reinstatement within ten (10) years after the effective date of dissolution. The application must:

(a) Recite the name of the corporation and the date of its incorporation;

(b) State that the corporation applies for reinstatement;

(c) If the corporation's name has been appropriated by another entity whose organizational documents are filed with the secretary of state, be accompanied by articles of amendment by which the corporation adopts a new name which complies with the requirements of section 30-3-27, Idaho Code; and

(d) Be accompanied by a current annual report, appointment of registered agent pursuant to section 30-405, Idaho Code, or articles of amendment to extend the corporate existence, as appropriate to the reason for administrative dissolution.

(2) If the secretary of state determines that the application contains the information required by subsection (1) of this section and that the information is correct, he shall cancel the dissolution and prepare a certificate of reinstatement that recites the fact and effective date of the reinstatement, file a copy thereof and return the original to the corporation.

(3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

History.
I.C., § 30-3-115C, as added by 1998, ch. 267, § 7, p. 878; am. 2007, ch. 314, § 39, p. 887.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 314, in subsection (1)(c), deleted "or one deceptively similar thereto" following "corporation's name" and "either by a consent to the use of a deceptively similar name executed by the other entity or" following "be accompanied"; and in subsection (1)(d), inserted "pursuant to section 30-405, Idaho Code."

30-3-115D. Appeal from denial of reinstatement. — (1) If the secretary of state denies a corporation's application for reinstatement following administrative dissolution, he shall give the corporation written notice by first class mail that explains the reason or reasons for denial.

(2) The corporation may appeal the denial of reinstatement to the fourth district court, Ada County, Idaho, within thirty (30) days after receipt of the notice of denial. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the secretary of state's notice of dissolution, the corporation's application for reinstatement, and the secretary of state's notice of denial.

(3) The court may summarily order the secretary of state to reinstate the dissolved corporation or may take other action the court considers appropriate.

(4) The court's final decision may be appealed as in other civil proceedings.

History.
I.C., § 30-3-115D, as added by 1998, ch. 267, § 8, p. 878.

30-3-116. Authority to transact business required by foreign corporation. — (1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:

(a) Maintaining, defending, or settling any proceeding;

(b) Holding meetings of the board of directors or members or carrying on other activities concerning internal corporate affairs;

(c) Maintaining bank accounts;

(d) Maintaining offices or agencies for the transfer, exchange and registration of memberships or securities or maintaining trustees or depositaries with respect to those securities;

(e) Selling through independent contractors;

(f) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;

(g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

(i) Owning, without more, real or personal property;

(j) Conducting an isolated transaction that is completed within thirty (30) days and that is not one in the course of repeated transactions of a like nature;

(k) Transacting business in interstate commerce.

(3) The list of activities in subsection (2) is not exhaustive.

History.
I.C., § 30-3-116, as added by 1993, ch. 220, § 2, p. 685.

30-3-117. Consequences to foreign corporation of transacting business without authority. — (1) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(2) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

(3) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court

may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(4) Notwithstanding subsections (1) and (2) of this section, the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state.

History.

I.C., § 30-3-117, as added by 1993, ch. 220, § 2, p. 685.

30-3-118. Application of foreign corporation for certificate of authority. — (1) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state. The application must set forth:

(a) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of section 30-3-121, Idaho Code;

(b) The name of the state or country under whose law it is incorporated;

(c) The date of incorporation and period of duration;

(d) The street address of its principal office;

(e) The name and street address of its registered agent in this state;

(f) The names and usual business or home addresses of its current directors and officers;

(g) Whether the foreign corporation has members.

(2) The foreign corporation shall deliver with the completed application a certificate of corporate existence or status, or a document of similar import.

History.

I.C., § 30-3-118, as added by 1993, ch. 220, § 2, p. 685; am. 2000, ch. 124, § 2, p. 291; am. 2007, ch. 314, § 40, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, rewrote subsection (1)(e), which formerly read: "The street address of its registered office in this state and the name of its registered agent at that office."

30-3-119. Foreign corporation amended certificate of authority. — (1) A foreign corporation authorized to transact business in this state must obtain an amended certificate of authority from the secretary of state if it changes:

(a) Its corporate name;

(b) The period of its duration;

(c) Any of the information required by section 30-405, Idaho Code; or

(d) The state or country of its incorporation.

(2) The requirements of section 30-3-119 [30-3-118], Idaho Code, for obtaining an original certificate of authority apply to obtaining an amended certificate under this section and the corporation shall deliver with the application a certificate evidencing the change duly authenticated by the secretary of state or other official having custody or corporate records in the state or country under whose law it is incorporated.

History.
I.C., § 30-3-119, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 41, p. 887.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 314, added subsection (1)(c) and redesignated former subsection (1)(c) as (1)(d).

Compiler's Notes.
The bracketed insertion in subsection (2) was added by the compiler to correct the statutory reference.

30-3-120. Effect of issuance of certificate of authority to foreign corporation. — (1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this act.

(2) A foreign corporation with a valid certificate of authority has the same rights and enjoys the same privilege as and, except as otherwise provided by this act, is subject to the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character.

(3) This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.

History.
I.C., § 30-3-120, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-121. Corporate name of foreign corporation. — (1) If the corporate name of a foreign corporation does not satisfy the requirements of section 30-3-27, Idaho Code, the foreign corporation, to obtain or maintain a certificate of authority to transact business in this state, may use a fictitious name to transact business in this state if its real name is unavailable and it delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(2) Except as authorized in subsections (3) and (4) of this section, the corporate name, including a fictitious name, of a foreign corporation must be distinguishable upon the records of the secretary of state from:

(a) The corporate name of a nonprofit or business corporation incorporated or authorized to transact business in this state;

(b) A corporate name reserved or registered under section 30-3-28 or 30-3-29, Idaho Code; and

(c) The fictitious name of another foreign business or nonprofit corporation authorized to transact business in this state.

(3) A foreign corporation may apply to the secretary of state for authorization to use in this state the name of another corporation, incorporated or

authorized to transact business in this state, that is not distinguishable upon the records of the secretary of state from the name applied for. The secretary of state shall authorize use of the name applied for if:

(a) The other corporation consents to the use in writing and submits an undertaking in form satisfactory to the secretary of state to change its name to a name that is distinguishable upon the records of the secretary of state from the name of the applying corporation; or

(b) The applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A foreign corporation may use in this state the name, including the fictitious name, of another domestic or foreign business or nonprofit corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the foreign corporation:

(a) Has merged with the other corporation;

(b) Has been formed by reorganization of the other corporation; or

(c) Has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(5) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of section 30-3-27, Idaho Code, it shall not transact business in this state under the changed name until it adopts a name satisfying the requirements of section 30-3-27, Idaho Code, and obtains an amended certificate of authority under section 30-3-119, Idaho Code.

History.

I.C., § 30-3-121, as added by 1993, ch. 220, § 2, p. 685; am. 2000, ch. 325, § 3, p. 1095.

30-3-122. Registered office and registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-122, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42. See § 30-401 et seq.

30-3-123. Change of registered office or registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-123, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42. See § 30-401 et seq.

30-3-124. Resignation of registered agent of foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-124, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42. See § 30-401 et seq.

30-3-125. Service on foreign corporation. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-3-125, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42. See § 30-401 et seq.

30-3-126. Withdrawal of foreign corporation. — (1) A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the secretary of state a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the secretary of state an application for withdrawal, which shall set forth:

(a) The name of the corporation and the state or country under the laws of which it is incorporated;

(b) That the corporation is not transacting business in this state;

(c) That the corporation surrenders its authority to transact business in this state;

(d) That the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on such corporation by service thereon;

(e) A post-office address to which a copy of any process against the corporation may be served on it; and

(f) Such additional information as may be necessary or appropriate in order to enable the secretary of state to determine and assess any unpaid fees payable by such foreign corporation as in this act prescribed.

The application for withdrawal shall be made on forms prescribed and furnished by the secretary of state and shall be executed by the corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one (1) of the officers signing the application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

(2) Duplicate originals of such application for withdrawal shall be delivered to the secretary of state. If the secretary of state finds that such application conforms to the provisions of this act, he shall, when all fees have been paid as in this act prescribed:

(a) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof.

(b) File one (1) of such duplicate originals in his office.

(c) Issue a certificate of withdrawal to which he shall affix the other duplicate original.

The certificate of withdrawal, together with the duplicate original of the application for withdrawal affixed thereto by the secretary of state, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to transact business in this state shall cease.

History.

I.C., § 30-3-126, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 43, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, in subsection (1)(d), deleted "in the manner provided in section 30-3-125, Idaho Code" from the end; and in subsection (1)(e), deleted "pursuant to the provisions of section 30-3-125, Idaho Code" from the end.

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-127. Grounds for revocation of certificate of authority. — The secretary of state may commence a proceeding under section 30-3-128, Idaho Code, to revoke the certificate of authority of a foreign corporation authorized to transact business in this state if:

(1) The foreign corporation does not deliver its annual report to the secretary of state by the date on which it is due;

(2) The foreign corporation is without a registered agent in this state for sixty (60) days or more;

(3) The secretary of state has credible information that the foreign corporation has failed to notify the secretary of state by an appropriate filing within sixty (60) days of the occurrence that its registered agent has changed or that its registered agent has resigned;

(4) The secretary of state has credible information that an incorporator, director, officer or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the secretary of state for filing; or

(5) The secretary of state receives a duly authenticated certificate from the official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated, stating that it has been dissolved or has disappeared as a result of a merger.

History.

I.C., § 30-3-127, as added by 1998, ch. 267, § 10, p. 878; am. 2007, ch. 314, § 44, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-3-127, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 1998, ch. 267, § 9.

Amendments.

The 2007 amendment, by ch. 314, in subsection (2), deleted "or registered office" following "agent"; and in subsection (3), inserted "by an appropriate filing," and deleted "or registered office" following the first occurrence of "agent" and "or that its registered office has been discontinued" from the end.

30-3-128. Procedure and effect of revocation of authority of foreign corporation. — (1) If the secretary of state determines that one (1) or more grounds exist under section 30-3-127, Idaho Code, for revocation of a certificate of authority, he shall give notice of his determination to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the foreign corporation has not yet filed an annual report, to its registered office.

(2) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the secretary of state that each ground for revocation determined by the secretary of state does not exist within sixty (60) days after receipt of the notice of determination, the secretary of state may revoke the foreign corporation's certificate of authority by noting the fact of revocation and the effective date thereof in his records. The secretary of state shall give notice of the revocation to the foreign corporation by first class mail addressed to its mailing address as indicated on its most recent annual report, or if the foreign corporation has not yet filed an annual report, to its registered office.

(3) The authority of a foreign corporation to transact business in this state ceases on the date shown on the notice of revocation of its certificate of authority.

(4) Service of process on a foreign corporation whose certificate of authority has been revoked may be made upon its registered agent, if any.

(5) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

History.

I.C., § 30-3-128, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 11, p. 878; am. 2007, ch. 314, § 45, p. 887.

STATUTORY NOTES

Amendments.

The 2007 amendment, by ch. 314, deleted "or pursuant to section 30-3-125" from the end in subsection (4).

30-3-129. Appeal from revocation of certificate of authority of foreign corporation. — (1) A foreign corporation may appeal the secretary of state's revocation of its certificate of authority to the fourth district court, Ada County, Idaho, within thirty (30) days after receipt of the notice of revocation. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the secretary of state's certificate of revocation.

(2) The court may summarily order the secretary of state to reinstate the certificate of authority or may take any other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

History.
I.C., § 30-3-129, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 12, p. 878.

30-3-130. Corporate records. — (1) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized in section 30-3-79(4), Idaho Code.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;

(c) Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations and obligations of members or any class or category of members;

(d) The minutes of all meetings of members and records of all actions approved by the members for the past three (3) years;

(e) All written communications to members generally within the past seven (7) years, including the financial statements furnished for the past seven (7) years under section 30-3-134, Idaho Code;

(f) A list of the names and business or home addresses of its current directors and officers; and

(g) Its most recent annual report delivered to the secretary of state under section 30-3-136, Idaho Code.

History.
I.C., § 30-3-130, as added by 1993, ch. 220, § 2, p. 685.

JUDICIAL DECISIONS

Decisions Under Prior Law

Right to Inspect.
The right to inspect by a member of a nonprofit corporation was no less than that of a shareholder of a business corporation under the terms of the applicable statutes. Stueve v. Northern Lights, Inc., 118 Idaho 422, 797 P.2d 130 (1990).

30-3-131. Inspection of records by members. — (1) Subject to subsection (5) of this section and section 30-3-132(3), Idaho Code, a member is entitled to inspect and copy, at a reasonable time and location specified by

the corporation, any of the records of the corporation described in section 30-3-130(5), Idaho Code, if the member gives the corporation written notice or a written demand at least fifteen (15) business days before the date on which the member wishes to inspect and copy.

(2) Subject to paragraph (c) of this subsection, a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (3) of this section and gives the corporation written notice at least fifteen (15) business days before the date on which the member wishes to inspect and copy:

(a) Excerpts from any records required to be maintained under section 30-3-130(1), Idaho Code, to the extent not subject to inspection under section 30-3-131(1), Idaho Code;

(b) Accounting records of the corporation, and

(c) Subject to section 30-3-133, Idaho Code, the membership list.

(3) A member may inspect and copy the records identified in subsection (2) of this section only if:

(a) The member's demand is made in good faith and for a proper purpose reasonably related to the member's interest as a member of the corporation;

(b) The member describes with reasonable particularity the purpose and the records the member desires to inspect;

(c) The records are directly connected with this purpose; and

(d) The board of directors shall determine whether a member's request is for a proper purpose.

(4) The provisions of this section do not affect:

(a) The right of a member to inspect records under section 30-3-54, Idaho Code, or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(b) The board of directors may restrict or deny inspection of personnel and employment records, and confidential attorney-client communications if it determines that such restriction or denial of access to said records or information is in the best interests of the corporation.

(5) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

History.

I.C., § 30-3-131, as added by 1993, ch. 220, § 2, p. 685.

30-3-132. Scope of inspection rights. — (1) A member's agent or attorney has the same inspection and copying rights as the member the agent or attorney represents.

(2) The right to copy records under section 30-3-131, Idaho Code, includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(3) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The

charge may not exceed the estimated cost of production or reproduction of the records.

(4) The corporation may comply with a member's demand to inspect the record of members under section 30-3-131(2)(c), Idaho Code, by providing the member with a list of its members that was compiled no earlier than the date of the member's demand.

History.
I.C., § 30-3-132, as added by 1993, ch. 220, § 2, p. 685.

30-3-133. Limitations on use of membership list. — Without consent of the board, a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing, without the consent of the board a membership list or any part thereof may not be:

(1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;

(2) Used for any commercial purpose; or

(3) Sold to or purchased by any person.

History.
I.C., § 30-3-133, as added by 1993, ch. 220, § 2, p. 685.

30-3-134. Financial statements for members. — (1) Except as provided in the articles or bylaws of a religious corporation, a corporation upon written demand from a member shall furnish that member its latest annual financial statements, which may be consolidated or combined statements of the corporation and one (1) or more of its subsidiaries or affiliates, as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(2) If annual financial statements are reported upon by a public accountant, the accountant's report must accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records:

(a) Stating the president's or other person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(b) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

History.
I.C., § 30-3-134, as added by 1993, ch. 220, § 2, p. 685.

30-3-135. Report of indemnification to members. — If a corporation

indemnifies or advances expenses to a director under section 30-3-88, Idaho Code, in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the members with or before the notice of the next meeting of members.

History.
I.C., § 30-3-135, as added by 1993, ch. 220, § 2, p. 685.

30-3-136. Annual report for secretary of state. — (1) Each domestic corporation, and each foreign corporation authorized to transact business in this state, shall deliver to the secretary of state an annual report on a form prescribed and furnished by the secretary of state.

(2) The information in the annual report must be current on the date the annual report is executed on behalf of the corporation.

(3) The annual report shall be executed by one (1) of the persons identified in section 30-3-2, Idaho Code, or by another person who is authorized by the board of directors to execute the report. Execution of the annual report constitutes a representation that the person is authorized by the board of directors.

(4) No annual report need be filed during the first year after a corporation is incorporated or authorized to transact business in this state. The first, and all subsequent annual reports shall be delivered to the secretary of state each year before the end of the month during which a domestic corporation was initially incorporated or a foreign corporation was initially authorized to transact business.

(5) If an annual report does not contain the information required in this section, the secretary of state shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required in this section and delivered to the secretary of state within thirty (30) days after the effective date of notice, it is deemed to be timely filed.

(6) Annual reports may be filed electronically by domestic or foreign corporations by following the online filing instructions provided by the secretary of state.

History.
I.C., § 30-3-136, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 13, p. 878; am. 1999, ch. 210, § 2, p. 559; am. 2003, ch. 207, § 2, p. 550; am. 2005, ch. 274, § 2, p. 842.

30-3-137 — 30-3-141. Forfeiture of corporations — Reinstatement. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised, I.C., §§ 30-3-137 — 30-3-141, as added by 1993, ch. 220, § 2, p. 685, were repealed by S.L. 1998, ch. 267, § 14.

30-3-142. Application to existing domestic corporations. — This

act applies to all domestic nonprofit corporations in existence on the effective date of this act that were incorporated under the laws of this state.

History.
I.C., § 30-3-142, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which generally enacted chapter 3, title 30, Idaho Code. The effective date of S.L. 1993, ch. 220 was July 1, 1993.

30-3-143. Application to qualified foreign corporation. — A foreign corporation authorized to transact business in this state on the effective date of this act is subject to this act but is not required to obtain a new certificate of authority to transact business under this act.

History.
I.C., § 30-3-143, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1993, ch. 220, which generally enacted chapter 3, title 30, Idaho Code. The effective date of S.L. 1993, ch. 220 was July 1, 1993.

30-3-143A. Application to canal companies and carey act companies. — Should any provision of this chapter, as it pertains to canal companies or carey act companies, conflict with title 42, Idaho Code, the provisions of title 42, Idaho Code, shall prevail.

History.
I.C., § 30-3-143A, as added by 1997, ch. 282, § 8, p. 854.

STATUTORY NOTES

Cross References.
Carey act construction companies, § 42-2101 et seq.

Federal References.
The carey act, referred to in this section, is codified as 43 USCS § 641.

30-3-144. Saving provisions. — (1) Except as provided in subsection (2) of this section, the repeal of a statute by this act does not affect:

(a) The operation of the statute or any action taken under it before its repeal;

(b) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;

(c) Any violation of the statute or any penalty, forfeiture or punishment incurred because of the violation, before its repeal;

(d) Any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolu-

tion may be completed in accordance with the statute as if it had not been repealed; or

(e) Any meeting of members or directors or action by written consent noticed or any action taken before its repeal as a result of a meeting of members or directors or action by written consent.

(2) If a penalty or punishment imposed for violation of a statute repealed by this act is reduced by this act, the penalty or punishment if not already imposed shall be imposed in accordance with this act.

(3) Except as specifically provided in this act, this act shall not affect the provisions of other statutes applicable to any form of nonprofit corporation.

History.

I.C., § 30-3-144, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

30-3-145. Severability. — If any provision of this act or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of the act are severable.

History.

I.C., § 30-3-145, as added by 1993, ch. 220, § 2, p. 685.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1993, ch. 220, which is codified as the extant provisions of chapter 3, title 30, Idaho Code, except §§ 30-3-100A, 30-3-115A to 30-3-115D, 30-3-127, and 30-3-143A.

CHAPTER 4

IDAHO REGISTERED AGENTS ACT

SECTION.

30-401. Short title. — This chapter shall be known and may be cited as the "Idaho Registered Agents Act."

History.

I.C., § 30-401, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former Chapter 4 of Title 30, (§§ 30-401 to 30-426), which comprised S.L. 1927, ch. 88, §§ 1 to 23, 25 to 27, p. 107; I.C.A., §§ 29-401 to 29-426 was repealed by S.L. 1967, ch. 161, § 10-102. See § 28-8-101 et seq.

30-402. Definitions. — As used in this chapter:

(1) "Appointment of agent" means a statement appointing an agent for service of process filed by:

(a) A domestic or foreign unincorporated nonprofit association under section 53-710, Idaho Code; or

(b) A domestic entity that is not a filing entity or a nonqualified foreign entity under section 30-412, Idaho Code.

(2) "Commercial registered agent" means an individual or a domestic or foreign entity listed under section 30-406, Idaho Code.

(3) "Domestic entity" means an entity whose internal affairs are governed by the law of this state.

(4) "Entity" means a person that has a separate legal existence or has the power to acquire an interest in real property in its own name other than:

(a) An individual;

(b) A testamentary, inter vivos, or charitable trust, with the exception of a business trust, statutory trust, or similar trust;

(c) An association or relationship that is not a partnership by reason of section 53-3-202(c), Idaho Code, or a similar provision of the law of any other jurisdiction;

(d) A decedent's estate; or

(e) A public corporation, government or governmental subdivision, agency, or instrumentality, or quasi-governmental instrumentality.

(5) "Filing entity" means an entity that is created by the filing of a public organic document.

(6) "Foreign entity" means an entity other than a domestic entity.

(7) "Foreign qualification document" means an application for a certificate of authority or other foreign qualification filing with the secretary of state by a foreign entity.

(8) "Governance interest" means the right under the organic law or organic rules of an entity, other than as a governor, agent, assignee, or proxy, to:

(a) Receive or demand access to information concerning, or the books and records of, the entity;

(b) Vote for the election of the governors of the entity; or

(c) Receive notice of or vote on any or all issues involving the internal affairs of the entity.

(9) "Governor" means a person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs

of the entity are managed pursuant to the organic law and organic rules of the entity.

(10) "Interest" means:

(a) A governance interest in an unincorporated entity;

(b) A transferable interest in an unincorporated entity; or

(c) A share or membership in a corporation.

(11) "Interest holder" means a direct holder of an interest.

(12) "Jurisdiction of organization," with respect to an entity, means the jurisdiction whose law includes the organic law of the entity.

(13) "Noncommercial registered agent" means a person that is not listed as a commercial registered agent under section 30-406, Idaho Code, and that is:

(a) An individual or a domestic or foreign entity that serves in this state as the agent for service of process of an entity; or

(b) The individual who holds the office or other position in an entity that is designated as the agent for service of process pursuant to section 3-405(1)(b)(ii) [30-405(1)(b)(ii)], Idaho Code.

(14) "Nonqualified foreign entity" means a foreign entity that is not authorized to transact business in this state pursuant to a filing with the secretary of state.

(15) "Nonresident LLP statement" means:

(a) A statement of qualification of a domestic limited liability partnership that does not have an office in this state; or

(b) A statement of foreign qualification of a foreign limited liability partnership that does not have an office in this state.

(16) "Organic law" means the statutes, if any, other than this chapter, governing the internal affairs of an entity.

(17) "Organic rules" means the public organic document and private organic rules of an entity.

(18) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, business or similar trust, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(19) "Private organic rules" means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all of its interest holders, and are not part of its public organic document, if any.

(20) "Public organic document" means the public record, the filing of which creates an entity, and any amendment to or restatement of that record.

(21) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this state pursuant to a filing with the secretary of state.

(22) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(23) "Registered agent" means a commercial registered agent or a noncommercial registered agent.

(24) "Registered agent filing" means:

(a) The public organic document of a domestic filing entity;
(b) A nonresident LLP statement;
(c) A foreign qualification document; or
(d) An appointment of agent.
(25) "Represented entity" means:
(a) A domestic filing entity;
(b) A domestic or qualified foreign limited liability partnership that does not have an office in this state;
(c) A qualified foreign entity;
(d) A domestic or foreign unincorporated nonprofit association for which an appointment of agent has been filed;
(e) A domestic entity that is not a filing entity for which an appointment of agent has been filed; or
(f) A nonqualified foreign entity for which an appointment of agent has been filed.
(26) "Sign" means, with present intent to authenticate or adopt a record:
(a) To execute or adopt a tangible symbol; or
(b) To attach to or logically associate with the record an electronic sound, symbol, or process.
(27) "Transferable interest" means the right under an entity's organic law to receive distributions from the entity.
(28) "Type," with respect to an entity, means a generic form of entity:
(a) Recognized at common law; or
(b) Organized under an organic law, whether or not some entities organized under that organic law are subject to provisions of that law that create different categories of the form of entity.

History.
I.C., § 30-402, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-402 was repealed. See Prior Laws, § 30-401.

Compiler's Notes.
The bracketed insertion in paragraph (13)(b) was added by the compiler to correct the statutory reference.

OFFICIAL COMMENT

In general. Many of the definitions in this section were developed for use in the Model Entity Transactions Act (META). States that have adopted META should consider arranging their entity laws in such a manner that the definitions in META will apply more broadly and do not need to be repeated in other laws. The definitions that are common to this Act and META are:

"domestic entity"
"entity"
"filing entity"
"foreign entity"
"governance interest"
"governor"
"interest"
"interest holder"
"jurisdiction of organization"
"organic law"
"organic rules"
"person"
"private organic rules"
"public organic document"
"qualified foreign entity"

"record"
"sign"
"transferable interest"
"type"

The comments below with respect to defined terms taken from META are substantively the same as the corresponding comments in META.

"Appointment of agent." [(1)] — An appointment of agent is an optional filing that may be made by an entity that does not otherwise make a public filing in the state naming an agent for service of process. If a state has not enacted the Uniform Unincorporated Nonprofit Association Act, paragraph (A) [(a)] of this definition should be omitted.

"Commercial registered agent." [(2)] — A commercial registered agent is an individual or entity that is in the business of serving as a registered agent in the state and that files a listing statement under Section 6 [§ 30-406]. Being listed as a commercial registered agent is voluntary and persons serving as registered agents are not required to be listed under Section 6 [§ 30-406]. The benefits to the registered agent of being listed under Section 6 [§ 30-406], however, are substantial and most registered agents will elect to be so listed. Although this definition and Section 6 [§ 30-406] do not expressly require that a foreign entity that is listed as a commercial registered agent be qualified to do business in the state, the activity of serving as a registered agent is one that requires such registration.

"Domestic entity." [(3)] — The term "domestic entity" in this Act means an entity whose internal affairs are governed by the organic laws of the adopting state. Except in the case of general partnerships and unincorporated nonprofit associations, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under the Uniform Partnership Act (1997) (RUPA), it will mean a general partnership whose governing law under RUPA § 106 is the law of the adopting state. Under RUPA § 106 the governing law is determined by the location of the partnership's chief executive office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed. It is a factual question whether the activities and organization of an unincorporated nonprofit association make it a domestic or foreign entity.

This definition is patterned after Model Entity Transactions Act § 102(9) ("domestic entity").

"Entity." [(4)] — The term "entity" includes:

- Business corporation.
- Business or statutory trust.
- General partnership, whether or not a limited liability partnership.
- Limited liability company.
- Limited partnership, whether or not a limited liability limited partnership.
- Nonprofit corporation.
- Unincorporated nonprofit association.

The term does not include a sole proprietorship.

This definition is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by paragraphs (A) [(a)] through (E) [(e)]. Thus, this definition is broader than the definition of "business entity" in, e.g., Code of Ala. § 10-15-2(2) which does not include nonprofit entities. This definition does not exclude regulated entities such as public utilities, banks and insurance companies.

Inter vivos and testamentary trusts are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity." Trusts that carry on a business, however, such as a Massachusetts trust, real estate investment trust, Illinois land trust, or other common law or statutory business trusts are "entities."

Section 4 of the Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an "entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the Uniform Act have nonetheless modified the common law rule, but states that have not adopted the Uniform Act should analyze whether they should modify the definition of "entity" to add an express reference to unincorporated nonprofit associations.

There is some question as to whether a partnership subject to the Uniform Partnership Act (1914) (UPA) is an entity or merely an aggregation of its partners. That question has been resolved by Section 201 of the Uniform Partnership Act (1997) (RUPA), which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of UPA gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an "entity." As a result, all general partnerships will be "entities" regardless of whether the state in which they are organized has adopted RUPA.

Paragraph (C) [(c)] of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not a partner-

ship under RUPA. In that connection, Section 202(c) of RUPA provides in part:

In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships, respectively, that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status.

This definition is patterned after Model Entity Transactions Act § 102(13) ("entity").

"Filing entity." [(5)] — Whether an entity is a filing entity is determined by reference to whether its legal existence is attributable to the filing of a document with the state filing officer. While the statute refers to an entity that is "created," it is intended to encompass corporations which are "incorporated," limited liability companies which are "organized," and limited partnerships which are "formed" by a filing required by the organic law governing the entity. Business trusts (sometimes referred to as "statutory trusts") present a special problem. In some states, for example, a business trust is a filing entity, while in other states business trusts are recognized only by common law.

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.*, a statement of qualification under Uniform Partnership Act (1997), § 1001) does not create the entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is created by filing a certificate of limited partnership.

This definition is patterned after Model Entity Transactions Act § 102(14) ("filing entity"). See also Model Business Corporation Act § 1.40(9B) ("filing entity").

"Foreign entity." [(6)] — The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws of the state governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) (UPA) is a domestic or foreign partnership. A UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. Similar issues arise with respect to determining the domestic or foreign status of unincorporated nonprofit associations. The domestic or foreign characterization of partnerships under the Uniform Partnership Act (1997) (RUPA) that have not registered as limited liability partnerships will be governed by RUPA § 106(a) ("state where the partnership's chief executive office is located").

This definition is patterned after Model Entity Transactions Act § 102(15) ("foreign entity").

"Foreign qualification document." [(7)] — This definition should be construed broadly to include filings in the state that are required when a foreign entity is conducting activities in the state, regardless of whether the process is referred to as "obtaining a certificate of authority to do business," "qualifying to do business," "being authorized to transact business," or some other formulation.

"Governance interest." [(8)] — A governance interest is typically only part of the interest that a person will hold in an entity and is usually coupled with a transferable interest (or economic rights). However, memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and memberships in other nonprofit entities may not include either governance interests or transferable interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer transferable interests. An interest holder in such an unincorporated business entity who transfers only a transferable interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a transferable interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Shares in a business corporation that are nonvoting nonetheless have a governance interest because they entitle the holder to certain rights of access to information and to certain statutory voting rights on amendments of the articles of incorporation.

Governors of an entity have the kinds of rights listed in the definition of "governance interest" by reason of their position with the entity. For a governor to have a "governance interest," however, requires that the governor also have those rights for a reason other than the governor's status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will

have a governance interest arising from the ownership of a membership interest.

This definition is patterned after Model Entity Transactions Act § 102(16) ("governance interest").

"Governor." **[(9)]** — This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. *Compare* Colo. § 7-90-102(35.7) which uses the term "manager" to refer to this concept, even though "manager" is also a term of art in connection with limited liability companies. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

Except as described above, the term "governor" includes:

- Director of a business corporation.
- Director or trustee of a nonprofit corporation.
- General partner of a general partnership.
- General partner of a limited partnership.
- Manager of a limited liability company.
- Member of a member-managed limited liability company.
- Trustee of a business or statutory trust.

This definition is patterned after Model Entity Transactions Act § 102(17) ("governor").

"Interest." **[(10)]** — In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in many nonprofit corporations or unincorporated nonprofit associations do not have a transferable interest because they do not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under the Act. An interest holder in an unincorporated business entity may transfer all or part of the interest holder's transferable interest without the transferee acquiring the governance interest of the transferor. In that case, whether the transferor will retain the status of an interest holder will be determined by the applicable organic law and the transferee will have the status of an interest holder under paragraph (B) [(b)] of this definition. That paragraph will also apply to subsequent transferees from the original transferee.

The term "interest" includes:

- Beneficial interest in a business or statutory trust.
- Membership in a nonprofit corporation.
- Membership in an unincorporated nonprofit association.
- Membership interest in a limited liability company.
- Partnership interest in a general partnership.
- Partnership interest in a limited partnership.
- Shares in a business corporation.

This definition is patterned after Model Entity Transactions Act § 102(18) ("interest").

"Interest holder." **[(11)]** — This Act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs. *Compare* Code of Ala. § 10-15-2(4) ("equity owner").

The term "interest holder" includes:

- Beneficiary of a business or statutory trust.
- General partner of a general partnership.
- General partner of a limited partnership.
- Limited partner of a limited partnership.
- Member of a limited liability company.
- Member of a nonprofit corporation.
- Member of an unincorporated nonprofit association.
- Shareholder of a business corporation.

This definition is patterned after Model Entity Transactions Act § 102(20) ("interest holder"). See also Model Business Corporation Act § 1.40(13B) ("interest holder").

"Jurisdiction of organization." **[(12)]** — The term "jurisdiction of organization" refers to the jurisdiction whose laws include the organic law of the entity.

This definition is patterned after Model Entity Transactions Act § 102(22) ("jurisdiction of organization").

"Noncommercial registered agent." **[(13)]** — A noncommercial registered agent is a person that serves as an agent for service of process but that is not listed under Section 6 [§ 30-406]. All agents for service of process that are not commercial registered agents are noncommercial registered agents.

"Nonqualified foreign entity." [(14)] — A nonqualified foreign entity is a foreign entity for which there is no foreign qualification document in effect in the adopting state.

"Nonresident LLP statement." [(15)] — A nonresident LLP statement is the filing that is made by a limited liability partnership under Section 1001 of the Uniform Partnership Act (1997).

"Organic law." [(16)] — Organic law means statutes other than this Act that govern the internal affairs of an entity. Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.,* Cal. Gen. Corp. Law § 2115, N.Y. N-PCL §§ 1318-1321, 15 Pa.C.S. § 6145. Such a "sticky fingers" law is included within the definition of "organic law" for purposes of the Act.

If a state has adopted the Model Entity Transactions Act, it should amend this definition to also exclude that act from the term "organic law."

This definition is patterned after Model Entity Transactions Act § 102(26) ("organic law"). See also Model Business Corporation Act § 1.40(15B) ("organic law").

"Organic rules." [(17)] — The term "organic rules" means an entity's public organic document and its private organic rules.

This definition is patterned after Model Entity Transactions Act § 102(27) ("organic rules").

"Person." [(18)] — The term "person" has the standard meaning of that term in uniform acts.

"Private organic rules." [(19)] — The term private "organic rules" is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in written form, except for the provisions of the entity's public organic document, if any. The term is intended to include agreements in "record" form as well as oral partnership agreements and oral operating agreements among LLC members. Where private organic rules have been amended or restated, the term means the private organic rules as last amended or restated.

The term "private organic rules" includes:

- Bylaws of a business corporation.
- Bylaws of a business or statutory trust.
- Bylaws of a nonprofit corporation.
- Constitution and bylaws of an unincorporated nonprofit association.
- Operating agreement of a limited liability company.
- Partnership agreement of a general partnership.
- Partnership agreement of a limited partnership.

This definition is patterned after Model Entity Transactions Act § 102(30) ("private organic rules"). Compare Model Business Corporation Act § 1.40(17A) ("private organic document").

"Public organic document." [(20)] — A "public organic document" is a document that is filed of public record to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under Section 303 of the Uniform Partnership Act (1997) or any of the other statements that may be filed under that act since those statements do not create a new entity. A limited liability partnership is the same entity as the partnership that files the statement. For the same reason, the term also does not include a statement of qualification filed under Section 1001 of that act to become a limited liability partnership. Similarly, the term does not include a statement of authority filed under Section 5 of the Uniform Unincorporated Nonprofit Association Act or a statement appointing an agent filed under Section 10 of that act. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

The term "public organic document" includes:

- Articles of incorporation of a business corporation.
- Articles of incorporation of a nonprofit corporation.
- Certificate of limited partnership.
- Certificate of organization of a limited liability company.

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic document. But in those states where a business trust is not created by a public filing, the deed of trust or similar document will be part of the private organic rules of the business trust.

This definition is patterned after Model Entity Transactions Act § 102(32) ("public organic document").

"Qualified foreign entity." [(21)] — A qualified foreign entity is a foreign entity for which there is a foreign qualification document in effect in the adopting state.

This definition is patterned after Model Entity Transactions Act § 102(33) ("qualified foreign entity").

"Record." [(22)] — The term "record" has the standard meaning of that term in uniform acts.

"Registered agent." [(23)] — This term is used in the Act to refer to agents for service of process in contexts where it is not necessary to differentiate between commercial registered agents and noncommercial registered agents.

"Registered agent filing." [(24)] — Some states require that filings in addition to those listed in this definition, such as articles of amendment or articles of merger, state the registered agent information of the entity making the filing. In states where that is the case, this definition should be amended to add the following additional provision:

"(E) any other filing with the [Secretary of State] under an entity's organic law that must include the information required by Section 5(a)."

"Represented entity." [(25)] — This definition lists the various classes of entities for which registered agents act as agents for service of process.

"Sign." [(26)] — The term "sign" has the standard meaning of that term in uniform acts.

"Transferable interest." [(27)] — The term "transferable interest" is taken from Section 102(22) of the Uniform Limited Partnership Act (2001).

This definition is patterned after Model Entity Transactions Act § 102(38) ("transferable interest").

"Type." [(28)] — The term "type" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperative corporations are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

This definition is patterned after Model Entity Transactions Act § 102(39) ("type").

30-403. Fees. — (1) The secretary of state shall collect the following fees when a filing is made under this chapter:

(a) Commercial registered agent listing statement $100.00

(b) Commercial registered agent termination statement $20.00

(c) Statement of change $20.00

(d) Statement of resignation .... no fee

(e) Statement appointing an agent for service of process $20.00

(2) The secretary of state shall collect the following fees for copying and certifying a copy of any document filed under this chapter:

(a) Twenty-five cents (25¢) per page for copying; and

(b) Twenty dollars ($20.00) for a certificate.

History.

I.C., § 30-403, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-403 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Subsection (a) [(1)] establishes the filing fees for each type of document that may be filed under the Act. The dollar amounts for each filing should be inserted by the adopting state with reference to the filing fees charged for other filings with the Secretary of State.

Subsection (a)(4) [(1)(d)] provides that a fee is not required in connection with a filing of a statement of resignation. That permits a person who is named as a registered agent without the person's consent, or who agrees to serve as registered agent for a fee and the fee is not paid, to reflect properly the status of the person in the records of the Secretary of State without expense.

Subsection (b) [(2)] establishes fees for copying and certifying documents filed under the Act. The dollar amounts for these fees should be inserted by the adopting state with reference to the fees charged for those services under the state's various entity organic laws.

This section is patterned after Section 1.22 of the Model Business Corporation Act.

30-404. Addresses in filings. — Whenever a provision of this chapter other than section 30-411(1)(d), Idaho Code, requires that a filing state an address, the filing must state:

(1) An actual street address or rural route box number in this state; and

(2) A mailing address in this state, if different from the address under subsection (1) of this section.

History.

I.C., § 30-404, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-404 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

When this Act requires that a filing state an address, the address used must always be a geographic location. Where a person uses a post office box as its mailing address, paragraph (2) requires that the post office box address also be stated.

30-405. Appointment of registered agent. — (1) A registered agent filing must state:

(a) The name of the represented entity's commercial registered agent; or

(b) If the entity does not have a commercial registered agent:

(i) The name and street address of the entity's noncommercial registered agent; or

(ii) The title of an office or other position with the entity if service of process is to be sent to the person holding that office or position, and the street address of the business office of that person.

(2) The appointment of a registered agent pursuant to subsection (1)(a) or (b)(i) of this section is an affirmation by the represented entity that the agent has consented to serve as such.

(3) The secretary of state shall make available in a record as soon as practicable a daily list of filings that contain the name of a registered agent. The list must:

(a) Be available for at least fourteen (14) calendar days;

(b) List in alphabetical order the names of the registered agents; and

(c) State the type of filing and name of the represented entity making the filing.

History.

I.C., § 30-405, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-405 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Subsection (a)(1) [(1)(a)] gives an entity the option of listing just the name of its commercial registered agent in a registered agent filing and omitting the address of the registered agent. If the commercial registered agent subsequently changes its address, that change will be reflected in the filing made by the agent under Section 6 [§ 30-406], as amended under Section 10 [§ 30-410], but no change will be necessary in the registered agent filing of any of the entities represented by the commercial registered agent. The address of an entity's commercial registered agent may be ascertained from the records of the Secretary of State by consulting its listing under Section 6 [§ 30-406].

The address of an entity's noncommercial registered agent is usually not a business address of the represented entity. On the other hand, subsection 5(a)(2)(B) [(1)(b)(ii)] permits an entity to designate a person within the organization, such as its general counsel, to serve as its registered agent; and in that circumstance the address of the registered agent may very well be a business address of the represented entity.

The addresses required by subsection (a) [(1)] to be stated in a registered agent filing must satisfy the requirements in Section 4 [§ 30-404].

Subsection (b) [(2)] avoids the need to include with a registered agent filing a consent of the registered agent to serve as such.

Subsection (c) [(3)] creates a procedure that will permit registered agents to determine if they have been named in filings of which they were not aware by periodically consulting the list prepared by the Secretary of State. Subsection (c) [(3)] requires the registered agents to be listed in alphabetical order to facilitate the use of the list by registered agents and also to indicate the type of filing (e.g., articles of incorporation, certificates of limited partnership, appointments of agents under Section 12 [§ 30-412] of this Act, etc.) in which each registered agent is named. Subsection (c) [(3)] will not be necessary under the circumstances described in the Legislative Note because registered agents may consult the regular database maintained by the Secretary of State to verify when they have been named as a registered agent.

Subsection (a) [(1)] is a generalization of Section 5.01 of the Model Business Corporation Act, Section 114 of the Uniform Limited Partnership Act, and Section 108 of the Uniform Limited Liability Company Act.

30-406. Listing of commercial registered agent. — (1) An individual or a domestic or foreign entity may become listed as a commercial registered agent by filing with the secretary of state a commercial registered agent listing statement signed by or on behalf of the person which states:

(a) The name of the individual or the name, type, and jurisdiction of organization of the entity;

(b) That the person is in the business of serving as a commercial registered agent in this state; and

(c) The street address of a place of business of the person in this state to which service of process and other notice and documents being served on or sent to entities represented by it may be delivered.

(2) A commercial registered agent listing statement may include the information regarding acceptance of service of process in a record by the commercial registered agent provided for in section 30-413(4), Idaho Code.

(3) If the name of a person filing a commercial registered agent listing statement is not distinguishable on the records of the secretary of state from the name of another commercial registered agent listed under this section, the person must adopt a fictitious name that is distinguishable and use that name in its statement when it does business in this state as a commercial registered agent.

(4) A commercial registered agent listing statement takes effect upon filing.

(5) The secretary of state shall note the filing of the commercial registered agent listing statement in the index of filings maintained by the

secretary of state for each entity represented by the registered agent at the time of the filing. The statement has the effect of deleting the address of the registered agent from the registered agent filing of each of those entities.

History.
I.C., § 30-406, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-406 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

This section is a substantial simplification of practice because it removes the need to amend the filed record of every entity represented by a commercial registered agent when the agent changes its address.

Subsection (a)(3) [(1)(c)] only permits a commercial registered agent to list one address where service of process and other notices may be sent to entities represented by the agent. This may require a change in practice for registered agents who have previously maintained more than one address in a state and have permitted represented entities to choose which address they would use in their registered agent filings. A corporation, for example, located in one part of a state might include in its articles of incorporation an address for its registered agent which is the address of an office of the agent located close to the corporation and which is different than the address used by a corporation in another part of the state which has the same registered agent but uses a different office of the agent. In the example given, the registered agent will need to pick just one address in the state where all service of process will be sent to it. If a commercial registered agent wishes to maintain more than one office in a state where service of process will be received by it, it can accomplish that result by organizing separate entities to conduct its business in the state and filing separate statements for each entity under this section.

The address required by subsection (a)(3) [(1)(c)] to be stated in a commercial registered agent listing statement must satisfy the requirements in Section 4 [§ 30-404].

Subsection (e) [(5)] is a transitional provision that deals with the effect on the entities represented by a registered agent at the time the agent is first listed under this section. The effect is to amend the registered agent filing of each such entity to delete the address of the registered agent consistent with Section 5(a)(1) [(1)(a)].

This section is patterned generally after 15 Pa.C.S. § 109.

30-407. Termination of listing of commercial registered agent. — (1) A commercial registered agent may terminate its listing as a commercial registered agent by filing with the secretary of state a commercial registered agent termination statement signed by or on behalf of the agent which states:

(a) The name of the agent as currently listed under section 30-406, Idaho Code; and

(b) That the agent is no longer in the business of serving as a commercial registered agent in this state.

(2) A commercial registered agent termination statement takes effect on the thirty-first day after the day on which it is filed.

(3) The commercial registered agent shall promptly furnish each entity represented by it with notice in a record of the filing of the commercial registered agent termination statement.

(4) When a commercial registered agent termination statement takes effect, the registered agent ceases to be an agent for service of process on

each entity formerly represented by it. Until an entity formerly represented by a terminated commercial registered agent appoints a new registered agent, service of process may be made on the entity as provided in section 30-413, Idaho Code. Termination of the listing of a commercial registered agent under this section does not affect any contractual rights a represented entity may have against the agent or that the agent may have against the entity.

History.
I.C., § 30-407, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-407 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

This section provides a procedure for a commercial registered agent to withdraw from the business of providing registered agent services. Use of the procedure in this section will terminate the status of the registered agent as the agent for service of process of all the entities represented by the agent. Thus, the procedure in this section differs from the procedure in Section 11 [§ 30-411], which permits a registered agent to resign with respect to just a single represented entity instead of resigning generally with respect to all of its represented entities.

30-408. Change of registered agent by entity. — (1) A represented entity may change the information currently on file under section 30-405(1), Idaho Code, by filing with the secretary of state a statement of change signed on behalf of the entity which states:

(a) The name of the entity; and

(b) The information that is to be in effect as a result of the filing of the statement of change.

(2) The interest holders or governors of a domestic entity need not approve the filing of:

(a) A statement of change under this section; or

(b) A similar filing changing the registered agent or registered office of the entity in any other jurisdiction.

(3) The appointment of a registered agent pursuant to subsection (1) of this section is an affirmation by the represented entity that the agent has consented to serve as such.

(4) A statement of change filed under this section takes effect upon filing.

(5) As an alternative to using the procedures in this section, a represented entity may change the information currently on file under section 30-405(1), Idaho Code, by amending its most recent registered agent filing in the manner provided by the laws of this state other than this chapter for amending that filing.

History.
I.C., § 30-408, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-408 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Changes of the registered agent or the office address of a registered agent are usually routine matters that do not affect the rights of the interest holders of the represented entity. This section permits those changes to be made without a formal amendment of an entity's public organic document, without approval of its interest holders, and, indeed, even without formal approval by its governors (i.e., the persons managing the entity's affairs, such as the board of directors of a corporation).

Subsection (c) [(3)] avoids the need to file with a statement of change a consent of the new registered agent being designated.

Subsection (e) [(5)] makes clear that the procedures in this section are not exclusive. A common way in which an entity changes its registered agent or registered office is to include the change in an amendment of its public organic document.

Subsection (a) [(1)] is a generalization of Section 5.02(a) of the Model Business Corporation Act, Section 115 of the Uniform Limited Partnership Act, and Section 109 of the Uniform Limited Liability Company Act. As to subsection (c) [(3)], compare Section 5.02(a)(5) of the Model Business Corporation Act. Subsection (d) [(4)] is patterned after Section 115(b) of the Uniform Limited Partnership Act.

30-409. Change of name or address by noncommercial registered agent. — (1) If a noncommercial registered agent changes its name or its address as currently in effect with respect to a represented entity pursuant to section 30-405(1), Idaho Code, the agent shall file with the secretary of state, with respect to each entity represented by the agent, a statement of change signed by or on behalf of the agent which states:

(a) The name of the entity;

(b) The name and address of the agent as currently in effect with respect to the entity;

(c) If the name of the agent has changed, its new name; and

(d) If the address of the agent has changed, the new address.

(2) A statement of change filed under this section takes effect upon filing.

(3) A noncommercial registered agent shall promptly furnish the represented entity with notice in a record of the filing of a statement of change and the changes made by the filing.

History.
I.C., § 30-409, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-409 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

This section permits a noncommercial registered agent to change the name and address of the agent that appears in the registered agent filing of an entity represented by the agent. Because the noncommercial registered agent is not listed under Section 6 [§ 30-406],

the agent will not be able to use the procedures in Section 10 [§ 30-410] which permit commercial registered agents to make only one filing to change their name and address for all entities represented by them. Thus the noncommercial registered agent will need to make a filing under this section for each entity represented by the agent.

An address included in a statement of change must satisfy the requirements in Section 4 [§ 30-404].

This section is patterned after 15 Pa.C.S. § 108.

30-410. Change of name, address, or type of organization by commercial registered agent. — (1) If a commercial registered agent changes its name, its address as currently listed under section 30-406(1), Idaho Code, or its type or jurisdiction of organization, the agent shall file with the secretary of state a statement of change signed by or on behalf of the agent which states:

(a) The name of the agent as currently listed under section 30-406(1), Idaho Code;

(b) If the name of the agent has changed, its new name;

(c) If the address of the agent has changed, the new address; and

(d) If the type or jurisdiction of organization of the agent has changed, the new type or jurisdiction of organization.

(2) The filing of a statement of change under subsection (1) of this section is effective to change the information regarding the commercial registered agent with respect to each entity represented by the agent.

(3) A statement of change filed under this section takes effect upon filing.

(4) A commercial registered agent shall promptly furnish each entity represented by it with notice in a record of the filing of a statement of change relating to the name or address of the agent and the changes made by the filing.

(5) If a commercial registered agent changes its address without filing a statement of change as required by this section, the secretary of state may cancel the listing of the agent under section 30-406, Idaho Code. A cancellation under this subsection has the same effect as a termination under section 30-407, Idaho Code. Promptly after canceling the listing of an agent, the secretary of state shall serve notice in a record in the manner provided in section 30-413(2) or (3), Idaho Code, on:

(a) Each entity represented by the agent, stating that the agent has ceased to be an agent for service of process on the entity and that, until the entity appoints a new registered agent, service of process may be made on the entity as provided in section 30-413, Idaho Code; and

(b) The agent, stating that the listing of the agent has been canceled under this section.

History.

I.C., § 30-410, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-410 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

This section permits a commercial registered agent to make a single filing that has the effect of changing the name or address of the agent for all of the entities represented by it.

An address included in a statement of change must satisfy the requirements in Section 4 [§ 30-404].

Subsection (e) [(5)] provides a procedure by which the Secretary of State may cancel the listing of a commercial registered agent when the Secretary of State learns that the agent has changed its address without amending its listing as a commercial registered agent. When the Secretary of State acts to cancel the listing of a commercial registered agent, the Secretary of State is required to notify both (i) the entities represented by the agent that they no longer have a valid registered agent and (ii) the agent that it no longer is listed as a commercial registered agent. Unlike in the case of a resignation under Section 11 [§ 30-411] which is initiated by the registered agent and thus does not require a notice from the Secretary of State to the agent, notice by the Secretary of State to the agent is needed under this section so that the agent has notice that its representation of the entities it previously represented has terminated under Section 7 [§ 30-407].

This section is patterned after 15 Pa.C.S. § 109(b).

30-411. Resignation of registered agent. — (1) A registered agent may resign at any time with respect to a represented entity by filing with the secretary of state a statement of resignation signed by or on behalf of the agent which states:

(a) The name of the entity;

(b) The name of the agent;

(c) That the agent resigns from serving as agent for service of process for the entity; and

(d) The name and address of the person to which the agent will send the notice required by subsection (3) of this section.

(2) A statement of resignation takes effect on the earlier of the thirty-first day after the day on which it is filed or the appointment of a new registered agent for the represented entity.

(3) The registered agent shall promptly furnish the represented entity notice in a record of the date on which a statement of resignation was filed.

(4) When a statement of resignation takes effect, the registered agent ceases to have responsibility for any matter tendered to it as agent for the represented entity. A resignation under this section does not affect any contractual rights the entity has against the agent or that the agent has against the entity.

(5) A registered agent may resign with respect to a represented entity whether or not the entity is in good standing.

History.

I.C., § 30-411, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-411 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Resignation under this section may be accomplished solely by action of the registered agent and does not require the cooperation or consent of the represented entity. Whether a resignation violates a contract between the registered agent and the represented entity is beyond the scope of this Act and subsection (d) [(4)] preserves whatever claims a represented entity may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this section are followed.

Resignation under this section relates only to the entity named in the statement of resignation. Thus, the procedure in this section differs from the procedure in Section 7 [§ 30-407] which terminates the status of the agent as agent for all of the entities represented by it.

The requirements of Section 4 [§ 30-404] with respect to addresses do not apply to subsection (a)(4) [(1)(d)] because the registered agent may not have all the required information available.

Subsection (b) [(2)] delays the effectiveness of a statement of resignation for 31 days to allow the notice of the resignation that must be sent under subsection (c) [(3)] to reach the represented entity and to allow the represented entity to arrange for a substitute registered agent.

Subsection (e) [(5)] makes clear that a registered agent may resign with respect to an entity that is not in good standing and supersedes the contrary administrative practice in some states of refusing to accept any filings with respect to an entity that is not in good standing until the problem with the entity's standing is cured.

Subsection (a) [(1)] is a generalization of Section 5.03(a) of the Model Business Corporation Act, Section 116(a) of the Uniform Limited Partnership Act, and Section 110(a) of the Uniform Limited Liability Company Act. Subsection (b) [(2)] is a generalization of Section 5.03(c) of the Model Business Corporation Act, Section 116(c) of the Uniform Limited Partnership Act, and Section 110(c) of the Uniform Limited Liability Company Act. Subsection (c) [(3)] is derived from Section 5.03(b) of the Model Business Corporation Act, Section 116(b) of the Uniform Limited Partnership Act, and Section 110(b) of the Uniform Limited Liability Company Act, except that notice under this Act is to be given by the resigning registered agent rather than the Secretary of State.

30-412. Appointment of agent by nonfiling or nonqualified foreign entity. — (1) A domestic entity that is not a filing entity or a nonqualified foreign entity may file with the secretary of state a statement appointing an agent for service of process signed on behalf of the entity which states:

(a) The name, type, and jurisdiction of organization of the entity; and

(b) The information required by section 30-405(1), Idaho Code.

(2) A statement appointing an agent for service of process takes effect upon filing.

(3) The appointment of a registered agent under this section does not qualify a nonqualified foreign entity to do business in this state and is not sufficient alone to create personal jurisdiction over the nonqualified foreign entity in this state.

(4) A statement appointing an agent for service of process may not be rejected for filing because the name of the entity filing the statement is not distinguishable on the records of the secretary of state from the name of another entity appearing in those records. The filing of a statement appointing an agent for service of process does not make the name of the entity filing the statement unavailable for use by another entity.

(5) An entity that has filed a statement appointing an agent for service of process may cancel the statement by filing a statement of cancellation, which shall take effect upon filing, and must state the name of the entity and that the entity is canceling its appointment of an agent for service of process in this state. A statement appointing an agent for service of process

which has not been canceled earlier is effective for a period of five (5) years after the date of filing.

(6) A statement appointing an agent for service of process for a nonqualified foreign entity terminates automatically on the date the entity becomes a qualified foreign entity.

History.
I.C., § 30-412, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-412 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Filing under this section is elective, and no inference should be drawn from the failure of an entity to make such a filing.

Subsection (a) [(1)] is patterned after Section 10 of the Uniform Unincorporated Nonprofit Association Act.

30-413. Service of process on entities. — (1) A registered agent is an agent of the represented entity authorized to receive service of any process, notice, or demand required or permitted by law to be served on the entity.

(2) If an entity that previously filed a registered agent filing with the secretary of state no longer has a registered agent, or if its registered agent cannot with reasonable diligence be served, the entity may be served by registered or certified mail, return receipt requested, addressed to the governors of the entity by name at its principal office in accordance with any applicable judicial rules and procedures. The names of the governors and the address of the principal office may be as shown in the most recent annual report filed with the secretary of state. Service is perfected under this subsection at the earliest of:

(a) The date the entity receives the mail;

(b) The date shown on the return receipt, if signed on behalf of the entity; or

(c) Five (5) days after its deposit with the United States postal service, if correctly addressed and with sufficient postage.

(3) If process, notice, or demand cannot be served on an entity pursuant to subsection (1) or (2) of this section, service of process may be made by handing a copy to the manager, clerk, or other person in charge of any regular place of business or activity of the entity if the person served is not a plaintiff in the action.

(4) Service of process, notice, or demand on a registered agent must be in the form of a written document, except that service may be made on a commercial registered agent in such other forms of a record, and subject to such requirements as the agent has stated from time to time in its listing under section 30-406, Idaho Code, that it will accept.

(5) Service of process, notice, or demand may be perfected by any other means prescribed by law other than this chapter.

History.
I.C., § 30-413, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-413 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

Subsection (c) [(3)] provides a means for serving process on an entity that cannot be served under subsection (a) [(1)] or (b) [(2)]. Some entity organic laws require that service of process in that circumstance be made on the Secretary of State, but that leaves unanswered the question of what the Secretary of State should do with the process. Subsection (c) [(3)] is patterned after Pa. R. Civ. Proc. 423(3) and 424(2). A similar approach is taken by Fed. R. Civ. Proc. 4(h)(1).

Subsections (a) [(1)] and (d) [(4)] are a generalization of Section 5.04(a) and (c) of the Model Business Corporation Act, Section 117(a) and (f) of the Uniform Limited Partnership Act, and Section 111(a) and (e) of the Uniform Limited Liability Company Act. Subsection (b) [(2)] is a generalization of Section 5.04(b) of the Model Business Corporation Act.

30-414. Duties of registered agent. — The only duties under this chapter of a registered agent that has complied with this chapter are:

(1) To forward to the represented entity at the address most recently supplied to the agent by the entity any process, notice, or demand that is served on the agent;

(2) To provide the notices required by this chapter to the entity at the address most recently supplied to the agent by the entity;

(3) If the agent is a noncommercial registered agent, to keep current the information required by section 30-405(1), Idaho Code, in the most recent registered agent filing for the entity;

(4) If the agent is a commercial registered agent, to keep current the information listed for it under section 30-406(1), Idaho Code; and

(5) To have an individual available during normal business hours at the registered agent's street address to accept service of process and other notices and documents.

History.
I.C., § 30-414, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-414 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

This section is limited to prescribing the duties of a registered agent under this Act. An agent may undertake other responsibilities to a represented entity, such as by contract or course of dealing, but those duties will be determined under other law.

The Delaware General Corporation Law has been amended to add a new Section

132(b)(1), 8 Del. Code § 132(b)(1), requiring a registered agent to be generally available in the state to accept service of process. It was not considered necessary to include that provision in the Act because Section 13 [§ 30-413] provides alternative means of serving process if a registered agent cannot with reasonable diligence be served.

The Delaware General Corporation has also been amended to require a represented corporation to notify its registered agent when the corporation changes its business address and to permit a registered agent to resign if it is not supplied with current contact information. 8 Del. Code § 132(d). Section 11 [§ 30-411] of the Act provides registered agents with a broader right to resign than is available under the Delaware amendment.

30-415. Jurisdiction and venue. — The appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state. The address of the agent does not determine venue in an action or proceeding involving the entity.

History.

I.C., § 30-415, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-415 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

As discussed in the Introduction to the Act, one of the purposes of the Act is to eliminate the registered office address as a means of determining where venue is to be laid in an action involving a represented entity. Consistent with that purpose, this section makes clear that the address of a registered agent does not determine venue. This section may be inconsistent with other law or procedural rules in a state, and thus existing law on venue should be reviewed when this Act is considered for adoption in a state. *Compare Cooper v. Chevron U.S.A., Inc.*, 132 N.M. 382, 49 P.3d 61 (N.M. 2002) (applying New Mexico statute permitting venue "in the county where the statutory agent designated by the foreign corporation resides").

30-416. Consistency of application. — In applying and construing this chapter, consideration must be given to the need to promote consistency of the law with respect to its subject matter among states that enact it.

History.

I.C., § 30-416, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-416 was repealed. See Prior Laws, § 30-401.

OFFICIAL COMMENT

A provision similar to this section is included in each uniform act promulgated by the Conference. Because this Act is not a uniform act, however, the usual formulation

of this section has been changed from "uniformity" of application to "consistency" of application to promote the same policy while recognizing the different nature of this Act.

30-417. Relation to electronic signatures in global and national commerce act. — This chapter modifies, limits, and supersedes the federal electronic signatures in global and national commerce act, 15 U.S.C. section 7001, et seq., but does not modify, limit, or supersede section 101 of that act, 15 U.S.C. section 7001(c), or authorize delivery of any of the notices described in section 103 of that act, 15 U.S.C. section 7003(b).

History.
I.C., § 30-417, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-417 was repealed. See Prior Laws, § 30-401.

30-418. Savings clause. — This chapter does not affect an action or proceeding commenced or right accrued before July 1, 2007.

History.
I.C., § 30-418, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.
Former § 30-418 was repealed. See Prior Laws, § 30-401.

CHAPTER 5

CORPORATIONS

30-501. Corporations — Constitution of the state of Idaho. — Every corporation organized for any lawful purpose or purposes, whether a general business corporation or a designated class of corporation, shall, by the act of filing incorporation documents with the state of Idaho, acknowledge and accept the provisions of the constitution of the state of Idaho as binding upon that corporation.

History.
I.C., § 30-501, as added by 1996, ch. 354, § 1, p. 1182.

STATUTORY NOTES

Prior Laws.

Former § 30-501, which comprised R.S., § 2653; am. 1903, p. 49, § 1; am. R.C., § 2792; reen. 1915, ch. 124, § 1, p. 270; reen. C.L., § 2792a; C.S., § 4772; am. 1925, ch. 82, § 1, p. 116; am. 1929, ch. 282, § 1, p. 678; I.C.A., § 29-501; am. 1947, ch. 43, § 1, p. 48; am. 1955, ch. 2, § 1, p. 4; am. 1965, ch. 100, § 1, p. 186; am. 1978, ch. 308, § 11, p. 771, was repealed by S.L. 1979, ch. 105, § 1. For present law concerning the authority of foreign corporations to do business in the state, see § 30-1-1501 et seq.

30-502 — 30-515. Foreign corporations — Filing requirements, liability, etc. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1879, p. 3, § 5; R.S., § 2653; am. 1903, p. 49, § 1; am. R.C., § 2792; reen. 1915, ch. 124, § 1, p. 270; reen. C.L., §§ 2792b to 2792h; C.S., §§ 4772 to 4779; 1923, ch. 44, §§ 1, 2, p. 48; am. 1929, ch. 282, §§ 2, 3, p. 678; I.C.A., §§ 29-502 to 29-510; 1937, ch. 66, §§ 1, 2, p. 88; 1937, ch. 133, §§ 1, 2, p. 214; 1939, ch. 121, § 1, p. 218; am. 1959, ch. 173, § 3, p. 394; am. 1959, ch. 175, § 1, p. 407; am. 1971, ch. 111, §§ 24, 25, p. 233; am. 1977, ch. 252, §§ 7, 8, p. 738, were repealed by S.L. 1979, ch. 105, § 1. For present law concerning the authority of foreign corporations to do business in the state, see § 30-1-1501 et seq.

30-516, 30-517. Mortgage or deed of trust on real property. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1957, ch. 163, §§ 1, 2, p. 296, were repealed by S.L. 1959, ch. 173, § 4, p. 394.

30-518 — 30-521. Purpose of act — Doing business — Mergers. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1959, ch. 173, §§ 1, 2, p. 394; am. 1963, ch. 330, § 1, p. 945; I.C., § 30-520, as added by 1977, ch. 252, § 9, p. 738; I.C., § 30-521, as added by 1978, ch. 308, § 12, p. 771, were repealed by S.L. 1979, ch. 105, § 1.

CHAPTER 6

IDAHO UNIFORM LIMITED LIABILITY COMPANY ACT

Part 1. General Provisions

STATUTORY NOTES

Prior Laws.

Former Chapter 6, relating to the annual statement and license fees, was made up of the following:

Former §§ 30-601 to 30-604, which comprised S.L. 1907, p. 235, §§ 1, 2; reen. R.C. §§ 2784, 2785; am. 1909, p. 8, H.B. 15; am. 1912, ch. 6, §§ 1 to 4, p. 14 to 16; reen. C.L. 207:1 to 207:4; C.S. §§ 4780 to 4783; am. 1925, ch. 36, § 1, p. 49; I.C.A., §§ 29-601 to 29-604; am. 1939, ch. 180, § 1, p. 336; am. 1945, ch. 35, § 1, p. 46; am. 1945, ch. 150, § 1, p. 227; am. 1951, ch. 251, § 5, p. 540; am. 1955, ch. 104, § 1, p. 228; am. 1955, ch. 169, § 1, p. 342; am. 1959, ch. 72, § 5, p. 157; 1971, ch. 18, § 1, p. 31; am. 1972, ch. 244, § 1, p. 634; am. 1972, ch. 394, § 1, p. 1138; am. 1977, ch. 252, §§ 10 to 12, p. 738; am. 1978, ch. 308, § 13, p. 771, were repealed by S.L. 1979, ch. 105, § 7, effective July 1, 1981.

Former §§ 30-605 and 30-606, comprising 1912, ch. 6, §§ 5, 6, pp. 16, 17; reen. C.L. 207:5. 207:6; C.S., §§ 4784. 4785; I.C.A., §§ 29-605, 29-606; am. 1947, ch. 173, § 1, p. 430; am. 1951, ch. 17, § 1, p. 26, were repealed by S.L. 1972, ch. 244, § 2.

Former §§ 30-607 to 30-614, which comprised 1907, p. 235, § 3; reen. R.C. § 2786; 1912, ch. 6, §§ 7 to 11, p. 17 to 19; reen. C.L. 207:7 to 207:13; C.S., §§ 4786 to 4792; am. 1925, ch. 37, § 1, p. 150; am. 1929, ch. 60, § 1, p. 86; I.C.A., §§ 29-607 to 29-613; am. 1947, ch. 173, § 2, p. 430; am. 1947, ch. 205, § 1, p. 481; am. 1967, ch. 2, § 1, p. 4; am. 1978, ch. 14, §§ 1, 2, p. 26, were repealed by S.L. 1979, ch. 105, § 7, effective July 1, 1981.

Part 1. General Provisions

30-6-101. Short title. — This chapter may be cited as the "Idaho Uniform Limited Liability Company Act."

History.

I.C., § 30-6-101, as added by 2008, ch. 176, § 1, p. 480.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This Act is drafted to replace a state's current LLC statute, whether or not that statute is based on the original Uniform Limited Liability Company Act. Section 1104 [§ 30-6-1104] contains transition provisions.

IDAHO REPORTER'S COMMENT

The Idaho Uniform Limited Liability Company Act ("Idaho Act") includes some variations from the Revised Uniform Limited Liability Company Act ("RULLCA"). Idaho Reporter's Comments identify many of the material Idaho variations, but not all variations are accompanied by an Idaho Reporter's Comment. The Idaho Act uses a different subsection numbering

scheme than RULLCA. As a result, subsection references in the Comments to RULLCA will not always correspond to the numbering of the Idaho Act. The predecessor Idaho Limited Liability Company Act (which until July 1, 2010 continues to govern all limited liability companies formed prior to July 1, 2008 that do not elect to be subject to the Idaho Act in the interim) is codified in title 53, chapter 6, Idaho Code.

30-6-102. Definitions. — In this chapter:

(1) "Allied professional services" means professional services which are so related in substance that they are frequently offered in conjunction with one another as parts of the same service package to the consumer.

(2) "Certificate of organization" means the certificate required by section 30-6-201, Idaho Code. The term includes the certificate as amended or restated.

(3) "Contribution" means any benefit provided by a person to a limited liability company:

(a) In order to become a member upon formation of the company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the company;

(b) In order to become a member after formation of the company and in accordance with an agreement between the person and the company; or

(c) In the person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the company.

(4) "Debtor in bankruptcy" means a person that is the subject of:

(a) An order for relief under Title 11 of the United States Code or a successor statute of general application; or

(b) A comparable order under federal, state or foreign law governing insolvency.

(5) "Designated office" means:

(a) The office that a limited liability company is required to designate and maintain under section 30-6-113, Idaho Code; or

(b) The principal office of a foreign limited liability company.

(6) "Distribution," except as otherwise provided in section 30-6-405(7), Idaho Code, means a transfer of money or other property from a limited liability company to another person on account of a transferable interest.

(7) "Effective," with respect to a record required or permitted to be delivered to the secretary of state for filing under this chapter, means effective under section 30-6-205(3), Idaho Code.

(8) "Foreign limited liability company" means an unincorporated entity formed under the law of a jurisdiction other than this state and denominated by that law as a limited liability company.

(9) "Limited liability company," except in the phrase "foreign limited liability company," means an entity formed under this chapter.

(10) "Manager" means a person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in section 30-6-407(3), Idaho Code.

(11) "Manager-managed limited liability company" means a limited liability company that qualifies under section 30-6-407(1), Idaho Code.

(12) "Member" means a person that has become a member of a limited liability company under section 30-6-401, Idaho Code, and has not dissociated under section 30-6-602, Idaho Code.

(13) "Member-managed limited liability company" means a limited liability company that is not a manager-managed limited liability company.

(14) "Membership" or "membership interest" means, for purposes of a professional company formed under section 30-6-201A, Idaho Code, a member's transferable interest, together with the member's governance rights under part 4 of this chapter.

(15) "Operating agreement" means the agreement, whether or not referred to as an operating agreement and whether oral, in a record, implied, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters described in section 30-6-110(1), Idaho Code. The term includes the agreement as amended or restated.

(16) "Organizer" means a person that acts under section 30-6-201, Idaho Code, to form a limited liability company.

(17) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(18) "Principal office" means the principal executive office of a limited liability company or foreign limited liability company, whether or not the office is located in this state.

(19) "Professional company" means a limited liability company organized under the provisions of this chapter for the sole and specific purpose of rendering professional services, allied professional services, and services ancillary to the professional services and which has as its members only: (a) natural persons who themselves are duly licensed or otherwise legally authorized to render one (1) or more of the same professional services as the professional company; and/or (b) professional corporations, partnerships or limited liability companies, all of whose shareholders, partners or members are duly licensed or otherwise legally authorized to render one (1) or more of the same professional services as the professional company.

(20) "Professional service" means any type of service to the public which can be rendered by a member of any profession within the purview of his profession. For the purpose of this chapter, the professions shall be held to include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying and veterinary medicine, and no others.

(21) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(22) "Registered agent" means an agent for service of process in this state in accordance with chapter 4, title 30, Idaho Code.

(23) "Sign" means, with the present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound or process.

(24) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(25) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift and transfer by operation of law.

(26) "Transferable interest" means the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance with the operating agreement, whether or not the person remains a member or continues to own any part of the right.

(27) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member.

History.

I.C., § 30-6-102, as added by 2008, ch. 176, § 1, p. 480.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This Section contains definitions for terms used throughout the Act, while Section 1001 [not adopted in Idaho] contains definitions specific to Article 10's provisions on mergers, conversions and domestications. Section 405(g) [§ 30-6-405(7)] contains an exception to the definition of "distribution," which is specific to Section 405 [§ 30-6-405].

Paragraph (1) [(2)] Certificate of organization — The original ULLCA and most other LLC statutes use "articles of organization" rather than "certificate of organization." This Act purposely uses the latter term to signal that: (i) the certificate merely reflects the existence of an LLC (rather than being the locus for important governance rules); and (ii) this document is significantly different from articles of *incorporation*, which have a substantially greater power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of organization and the operating agreement, see Section 112(d) [§ 30-6-112(4)].

Paragraph (2) [(3)] Contribution — This definition serves to distinguish capital contributions from other circumstances under which a member or would-be member might provide benefits to a limited liability company (e.g., providing services to the LLC as an employee or independent contractor, leasing property to the LLC). The definition contemplates three typical situations in which contributions are made, and for each situation establishes two "markers" to identify capital contributions — the purpose for which the contributor makes the contribution and the agreement that contemplates the contribution:

circumstance	purpose/cause of providing benefits	the relevant agreement
pre-formation deal among would-be initial members [Paragraph 2(A) [(3)(a)]]	in order to become initial member(s)	agreement among would-be initial members
deal between an existing LLC and would-be member [Paragraph 2(B) [(3)(b)]]	in order to become a member	agreement between the LLC and the would-be member
member contribution [Paragraph 2(C) [(3)(c)]]	in member's capacity as a member	operating agreement or an agreement between the member and the LLC

This definition does not encompass capital raised from transferees, which is sometimes provided for in operating agreements. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 708(b)(1) [§ 30-6-708(2)(a)] ("reflects contributions made by a member and not previously returned").

Paragraph (7) [(8)] Foreign limited liability company — Some statutes have elaborate definitions addressing the question of whether a non-U.S. entity is a "foreign limited liability company." The NY statute, for example, defines a "foreign limited liability company" as:

> an unincorporated organization formed under the laws of any jurisdiction, including any foreign country, other than the laws of this state (i) that is not authorized to do business in this state under any other law of this state and (ii) of which some or all of the persons who are entitled (A) to receive a distribution of the assets thereof upon the dissolution of the organization or otherwise or (B) to exercise voting rights with respect to an interest in the organization have, or are entitled or authorized to have, under the laws of such other jurisdiction, limited liability for the contractual obligations or other liabilities of the organization.

N.Y Limit Liab. Co. Law § 102(k) (McKinney 2006). ULLCA § 101(8) [subsection (8) of this section] takes a similar but less complex approach ("an unincorporated entity organized under laws other than the laws of this State which afford limited liability to its owners comparable to the liability under Section 303 and is not required to obtain a certificate of authority to transact business under any law of this State other than this [Act]"). This Act follows Delaware's still simpler approach. Del. Code Ann. tit. 6, § 18-101(4) (2006) ("denominated as such").

Paragraph (8) [(9)] Limited liability company — This definition makes no reference to a limited liability company having members upon formation, but Section 201 [§ 30-6-201] does. For a detailed discussion of the "shelf LLC" issue, see the Comment to Section 201 [§ 30-6-201].

Paragraph (9) [(10)] Manager — The Act uses the word "manager" as a term of art, whose applicability is confined to manager-managed LLCs. The phrase "manager-managed" is itself a term of art, referring only to an LLC whose operating agreement refers to the LLC as such. Paragraph 10 [(11)] (defining "manager-managed limited liability company"). Thus, for purposes of this Act, if the members of a *member*-managed LLC delegate plenipotentiary management authority to one person (whether or not a member), this Act's references to "manager" do not apply to that person.

This approach does have the potential for confusion, but confusion around the term "manager" is common to almost all LLC statutes. The confusion stems from the choice to define "manager" as a term of art in a way that can be at odds with other, common usages of the word. For example, a member-managed LLC might well have an "office manager" or a "property manager." Moreover, in a manager-managed LLC, the "property manager" is not likely to be a manager as the term is used in many LLC statutes. *See, e.g., Brown v. MR Group, LLC,* 278 Wis.2d 760, 768-9, 693 N.W.2d 138, 143 (Wis. App. 2005) (rejecting a party's urging to use the dictionary definition of "manager" in determining coverage of a policy applicable to a limited liability company and its "managers" and relying instead on the meaning of the term under the Wisconsin LLC act).

Under this Act, the category of "person" is not limited to individuals. Therefore, a "manager" need not be a natural person. After a person ceases to be a manager, the term "manager" continues to apply to the person's conduct while a manager. *See* Section 407(c)(7) [§ 30-6-407(3)(g)].

Paragraph (10) [(11)] Manager-managed — This Act departs from most LLC statutes (including the original ULLCA) by authorizing a private agreement (the operating agreement) rather than a public docu-

ment (certificate or articles of organization) to establish an LLC's status as a manager-managed limited liability company. Using the operating agreement makes sense, because under this Act managerial structure creates no statutory power to bind the entity. *See* Section 301 [§ 30-6-301] (eliminating statutory apparent authority). The only direct consequences of manager-managed status are *inter se* — principally the triggering of a set of rules concerning management structure, fiduciary duty, and information rights. Sections 407 — 410 [§§ 30-6-407 through 30-6-410]. The management structure rules are entirely default provisions — subject to change in whole or in part by the operating agreement. The operating agreement can also significantly affect the duty and rights provisions. Section 110 [§ 30-6-110].

For pre-existing limited liability companies that eventually become subject to this Act, Section 1104(c) [§ 30-6-1104(3)(b)] provides that "language in the company's articles of organization designating the company's management structure will operate as if that language were in the operating agreement." For limited liability companies formed under this Act, the typical method to select manager-managed status will be an explicit provision of the operating agreement. However, a reference in the certificate of organization to manager-management might be evidence of the contents of the operating agreement. *See* Comment to Section 112(b) [§ 30-6-112(2)].

An LLC that is "manager-managed" under this definition does not cease to be so simply because the members fail to designate anyone to act as a manager. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Paragraph 10(A) and (B) [not adopted in Idaho] — In these paragraphs, the phrases "manager-managed" and "managed by managers" are "magic words" — i.e., for either subparagraph to apply, the operating agreement must include precisely the required language. However, the word "expressly" does not mean "in writing" or "in a record." This Act permits operating agreements to be oral (in whole or in part), and an oral provision of an operating agreement could contain the magic words. This Act also recognizes that provisions of an operating agreement may be reflected in patterns of conduct.

Oral and implied agreements invite memory problems and "swearing matches." Section 110(a)(4) [§ 30-6-110(1)(d)] empowers the operating agreement to determine "the means and conditions for the amending the operating agreement."

Paragraph 10(C) [not adopted in Idaho] — In contrast to Paragraphs 10(A) and (B), this provision does not contain "magic words" and considers instead all terms of the operating agreement that expressly refer to management by managers.

Paragraph 11 [(12)] Member — After a person has been dissociated as a member, Section 602 [§ 30-6-602], the term "member" continues to apply to the person's conduct while a member. *See* Section 603(b) [§ 30-6-603(2)].

Paragraph 12 [(13)] Member-managed limited liability company — A limited liability company that does not effectively designate itself a manager-member limited liability company will operate, subject to any contrary provisions in the operating agreement, under statutory rules providing for management by the members. Section 407(a) [§ 30-6-407(1)]. For a discussion of potential confusion relating to the term "manager", see the Comment to Paragraph 9 [(10)] (Manager).

Paragraph (13) [(15)] Operating Agreement — This definition must be read in conjunction with Sections 110 through 112 [§§ 30-6-110 through 30-6-112], which further describe the operating agreement. An operating agreement is a contract, and therefore all statutory language pertaining to the operating agreement must be understood in the context of the law of contracts.

The definition in Paragraph 13 [(15)] is very broad and recognizes a wide scope of authority for the operating agreement: "the matters described in Section 110(a) [§ 30-6-110(1)]." Those matters include not only all relations *inter se* the members and the limited liability company but also all "activities of the company and the conduct of those activities." Section 110(a)(3) [§ 30-6-110(1)(c)]. Moreover, the definition puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase "whether oral, in a record, implied, or in any combination thereof".

This Act states no rule as to whether the statute of frauds applies to an oral operating agreement. Case law suggests that an oral agreement to form a partnership or joint venture with a term exceeding one year is within the statute. *E.g. Abbott v. Hurst*, 643 So.2d 589, 592 (Ala. 1994) ("Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within

one year of its making and, therefore, to be outside the Statute of Frauds.") (citations omitted); *Pemberton v. Ladue Realty & Const. Co.*, 362 Mo. 768, 770-71, 244 S.W.2d 62, 64 (Mo. 1951) (rejecting plaintiff's contention that mere part performance sufficed to take the oral agreement outside the statute and holding that partnership was therefore at will); *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 827-28 (2d Cir. 1984) (same analysis with regard to a joint venture). However, it is not possible to form an LLC without someone signing and delivering to the filing officer a certificate of organization in record form, Section 201(a) [§ 30-6-201(1)], and the Act itself then establishes the LLC's duration. Subject to the operating agreement, that duration is perpetual. Section 104(c) [§ 30-6-104(3)]. An oral provision of an operating agreement calling for performance that extends beyond a year might be within the one-year provision — e.g., an oral agreement that a particular member will serve (and be permitted to serve) as manager for three years.

An oral provision of an operating agreement which involves the transfer of land, whether by or to the LLC, might come within the land provision of the statute of frauds. *Froiseth v. Nowlin*, 156 Wash. 314, 316, 287 P. 55. 56 (Wash. 1930) ("[The land provision] applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.") (quoting 27 Corpus Juris 220).).

In contrast, the fact that a limited liability company owns or deals in real property does not bring within the land provision agreements pertaining to the LLC's membership interests. Interests in a limited liability company are personal property and reflect no direct interest in the entity's assets. Re-ULLCA §§ 501 & 102(21) [§§ 30-6-501 & 30-6-102(26)]. Thus, the real property issues pertaining to the LLC's ownership of land do not "flow through" to the members and membership interests. See, e.g., *Wooten v. Marshall*, 153 F. Supp. 759, 763-764 (S.D. N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]."

The operating agreement may comprise a number of separate documents (or records), however denominated, unless the operating agreement itself provides otherwise. Section 110(a)(4) [§ 30-6-110(1)(d)]. Absent a contrary provision in the operating agreement, a threshold qualification for status as part of the "operating agreement" is the assent of all the persons then members. An agreement among less than all of the members might well be enforceable among those members as parties, but would not be part of the operating agreement.

An agreement to form an LLC is not itself an operating agreement. The term "operating agreement" presupposes the existence of members, and a person cannot have "member" status until the LLC exists. However, the Act's very broad definition of "operating agreement" means that, as soon as a limited liability company has any members, the limited liability company has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC, (ii) they form the LLC or cause it to be formed, and (iii) without further ado or agreement, they become the LLC's initial members. The LLC has an operating agreement. "[A]ll the members" have agreed on who the members are, and that agreement — no matter how informal or rudimentary — is an agreement "concerning the matters described in Section 110(a) [§ 30-6-110(1)]." (To the extent the agreement does not provide the *inter se* "rules of the game," this Act "fills in the gaps." Section 110(b) [§ 30-6-110(2)].)

The same result follows when a person becomes the sole initial member of an LLC. It is not plausible that the person would lack any understanding or intention with regard to the LLC. That understanding or intention constitutes an "agreement of all the members of the limited liability company, including a sole member."

It may seem oxymoronic to refer an "agreement of ... a sole member," but this approach is common in LLC statutes. *See, e.g.,* Ariz. Rev. Stat. Ann. § 29-601 (14)(b) (2006) (defining operating agreement to mean "in the case of a limited liability company that has a single member, any written or oral statement of the member made in good faith"); Colo. Rev. Stat. Ann. § 7-80-102 (11)(b)(I) (2006) (defining operating agreement to include, in the case of a single member LLC "[a]ny writing, without regard to whether such writing otherwise constitutes an agreement ... signed by the sole member"; N.H. Rev. Stat. Ann. § 304-c:1 (VI) (2006) (defining limited liability company agreement to include "a document adopted by the sole member"); Or. Rev. Stat. Ann. § 63.431(2) (2005) (vesting the "power to adopt, alter, amend or repeal an operating agreement of ... a single member limited liability company, in the sole member of the limited liability company"); R.I. Gen. Laws

§ 7-16-2 (19) (2005) (stating that the term operating agreement "includes a document adopted by the sole member of a limited liability company that has only one member"); and Wash. Rev. Code Ann. § 25.15.005 (5) (2006) (defining limited liability company agreement to include "any written statement of the sole member").

This re-definition of "agreement" is a function of "path dependence." By the time single-member LLCs became widely accepted, almost all LLC statutes were premised on the LLC's key organic document being the operating agreement. Because a key function of the operating agreement is to override statutory default rules, it was necessary to make clear that a sole member could make an operating agreement. Such an agreement may also be of interest to third parties, because the operating agreement binds the LLC. Section 111(a) [§ 30-6-111(1)].

In light of Paragraph 13's [15's] broad definition, it is possible to argue that any activity involving unanimous consent of the members becomes part of the operating agreement. For example, if pursuant to an operating agreement all the members consent to the redemption of one-half of the managing-member's transferable interest, does that action constitute an addition to the agreement?

Typically, such questions will turn on the practical issue of whether the unanimous consent pertained solely to a single event (now past) or also to future circumstances (now in controversy) rather than on the semantic question of whether the operating agreement has been amended. Occasionally, however, the amendment *vel non* question could have practical import. For example, if the operating agreement entitles a non-member to approve (or veto) amendments, see Section 112(a) [§ 30-6-112(1)], the members and the non-member might see the matter quite differently.

Careful drafting of veto provisions can help avoid controversy — e.g., by defining with specificity the type of decisions subject to the veto. On the question of how far a written (or "in a record") operating agreement can go to prevent oral or implied-in-fact terms, see Section 110(a)(4).

If it is necessary for a court to decide whether the contents of a matter approved by unanimous consent have become part of the operating agreement, the court should rely on principles of contract interpretation and look:

- first, at the manifestations of the members, including:
  - the manifestations made to give the unanimous consent; and
  - any terms of the operating agreement (e.g., terms specifying how matters become part of the operating agreement); and
- second, at whether, viewed from the perspective of a reasonable person in the position of the members giving consent, the consent was intended to incorporate the matter into the ongoing "rules of the game" or merely take some particular action as already permitted by those rules.

Of course, if all the members have the same understanding, the reasonableness *vel non* of that understanding is irrelevant and the shared meaning governs. *See* Restatement (Second) of Contracts, § 201(1) (1981).

Paragraph (14) [(16)] Organizer — If an LLC is to have one or more members when the filing officer files the certificate of organization, the organizer: (i) acts on behalf of the person or persons who will become the LLC's initial members, Section 401(a) and (b) [§ 30-6-401(1) and (2)]; and (ii) has no function other than to compose, sign, and deliver to the filing officer for filing the certificate of organization. Section 201(a) [§ 30-6-201(1)]. If an LLC is to have its first member sometime *after* the filing officer files the certificate of organization, the organizer has the power to admit the initial member or members, Section 401(c) [§ 30-6-401(3)], and to sign and deliver for filing the notice of initial membership described in Section 201(e)(1) [§ 30-6-201(3)(a)]. Whether in this latter category of circumstances the organizer acts on behalf of the initial member or members is determined under ordinary principles of agency law and depends on the facts of each situation.

Paragraph (20) [(25)] Transfer — The reference to "transfer by operation of law" is significant in connection with Section 502 [§ 30-6-502] (Transfer of Transferable Interest). That section severely restricts a transferee's rights (absent the consent of the members), and this definition makes those restrictions applicable, for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a member. The restrictions also apply to transfers in the context of a member's bankruptcy, except to the extent that bankruptcy law supersedes this Act.

Paragraph (21) [(27)] Transferee — "Transferee" has displaced "assignee" as the Conference's term of art.

IDAHO REPORTER'S COMMENT

The definitions for "allied professional services," "membership" or "membership interest," "professional company," "professional service," and "registered agent" are Idaho additions to RULLCA.

30-6-103. Knowledge — Notice. — (1) A person knows a fact when the person:

(a) Has actual knowledge of it; or

(b) Is deemed to know it under subsection (4)(a) of this section or law other than this chapter.

(2) A person has notice of a fact when the person:

(a) Has reason to know the fact from all of the facts known to the person at the time in question; or

(b) Is deemed to have notice of the fact under subsection (4)(b) of this section;

(3) A person notifies another of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact.

(4) A person that is not a member is deemed:

(a) To know of a limitation on authority to transfer real property as provided in section 30-6-302(7), Idaho Code; and

(b) To have notice of a limited liability company's:

(i) Dissolution, ninety (90) days after a statement of dissolution under section 30-6-702(2)(b)(i), Idaho Code, becomes effective;

(ii) Termination, ninety (90) days after a statement of termination under section 30-6-702(2)(b)(vi), Idaho Code, becomes effective; and

(iii) Merger, conversion or domestication, ninety (90) days after articles of merger, conversion or domestication under part 10 of this chapter become effective.

History.

I.C., § 30-6-103, as added by 2008, ch. 176, § 1, p. 482.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations (RUPA, ULLCA, and ULPA (2001)). Each of those acts borrowed heavily from the comparable UCC provisions. For the most part, this Act relies instead on generally applicable principles of agency law, and therefore this section is mostly confined to rules specifically tailored to this Act.

Several facets of this section warrant particular note. First, and most fundamentally, because this Act does not provide for "statutory apparent authority," see Section 301 [§ 30-6-301], this section contains no special rules for attributing to an LLC information possessed, communicated to, or communicated by a member or manager.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this Act than in other circumstances; and (iv) are the subject of considerable attention in the new Restatement (Third) of Agency.

Third, this Act does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that

conceptualization is counter-intuitive for the non-*aficionado*. In ordinary usage, notice has a meaning separate from knowledge. This Act follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) [(1)(b)] — In this context, the most important source of "law other than this chapter" is the common law of agency.

Subsection (b)(1) [(2)(a)] — The "facts known to the person at the time in question" include facts the person is deemed to know under subsection (a)(2) [(1)(b)].

Subsection (d)(2) [(4)(b)] — Under this Act, the power to bind a limited liability company to a third party is primarily a matter of agency law. Section 301 [§ 30-6-301], Comment. The constructive notice provided under this paragraph will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

30-6-104. Nature, purpose and duration of limited liability company. — (1) A limited liability company is an entity distinct from its members.

(2) A limited liability company may have any lawful purpose.

(3) A limited liability company has perpetual duration.

(4) A limited liability company may have one (1) or more members.

History.

I.C., § 30-6-104, as added by 2008, ch. 176, § 1, p. 483.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Entity Distinct.

As a separate legal entity, affirmative defenses regarding the misconduct of a limited liability company's member are inapplicable against the company, unless the claimant demonstrates that the company is actually the alter ego of the member. To prove that a company is the alter ego of a member of the company, a claimant must demonstrate (1) a unity of interest and ownership to a degree that the separate personalities of the company and individual no longer exist and (2) if the acts are treated as acts of the company, an inequitable result would follow. Sirius LC v. Erickson, 150 Idaho 80, 244 P.3d 224 (2010).

OFFICIAL COMMENT

Subsection (a) [(1)] — The "separate entity" characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, Section 304 [§ 30-6-304], and the charging order provision, Section 503 [§ 30-6-503].

Subsection (b) [(2)] — The phrase "any lawful purpose, [regardless of whether for profit]" means that: (i) a limited liability company need not have any business purpose; and (ii) the issue of profit *vel non* is irrelevant to the question of whether a limited liability company has been validly formed. Although some LLC statutes continue to require a business purpose, this Act follows the current trend and takes a more expansive approach.

The expansive approach comports both with the original ULLCA and with ULPA (2001). *See* ULLCA §§ 112(a) (captioned with reference to "Nature of Business" and permitting "any lawful purpose, subject to any law of this State governing or regulating business") and 101(3) (defining "Business" as including "every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit"); ULPA (2001) § 104(b) (permitting a limited partnership to be organized for any "lawful" purpose). *Compare* UPA § 6 (de-

fining a general partnership as organized for profit), RUPA § 101(6) (same), and RULPA (1976/85) § 106 (delineating the "Nature of [a limited partnership's] Business" by linking back to "any business that a partnership without limited partners may carry on").

The subsection does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.,* Minn. Stat. § 317A.811 (2006) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) [(3)] — In this context, the word "perpetual" is a misnomer, albeit one commonplace in LLC statutes. Like all current LLC statutes, this Act provides several consent-based avenues to override perpetuity: a term specified in the operating agreement; an event specified in the operating agreement; member consent. Section 701 [§ 30-6-701] (events causing dissolution). In this context, "perpetuity" actually means that the Act does not require a definite term and creates no nexus between the dissociation of a member and the dissolution of the entity. (The dissociation of an LLC's last remaining member does threaten dissolution. Section 701(a)(3) [§ 30-6-7-1(1)(c)] (stating, as a default rule, that a limited liability company dissolves "upon ... the passage of 90 consecutive days during which the company has no members").

An operating agreement is not a publicly-filed document, which means that the public record pertaining to a limited liability company will not necessarily reveal whether a limited liability company actually has a perpetual duration. *Accord* ULPA (2001) § 104, comment to subsection (c) ("The partnership agreement has the power to vary this subsection [which provides for perpetual duration], either by stating a definite term or by specifying an event or events which cause dissolution..... [The limited partnership act] also recognizes several other occurrences that cause dissolution. Thus, the public record pertaining to a limited partnership will not necessarily reveal whether the limited partnership actually has a perpetual duration.")

IDAHO REPORTER'S COMMENT

Subsection (2) — RULLCA includes the phrase: "... any lawful purpose, regardless of whether for profit". By striking the phrase "... regardless of whether for profit." in the Idaho Act, no implication is intended as to whether an Idaho limited liability company may or may not be organized without a business purpose or not-for-profit.

30-6-105. Powers. — A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities including, in the case of a professional company formed under this chapter, the power to render professional services.

History.

I.C., § 30-6-105, as added by 2008, ch. 176, § 1, p. 483.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Following ULPA (2001), § 105, this Act omits as unnecessary any detailed list of specific powers. *Compare* ULLCA § 112 (containing a detailed list).

The capacity to sue and be sued is mentioned specifically so that Section 110(c)(1) [§ 30-6-110(3)(a)] can prohibit the operating agreement from varying that capacity. An LLC's standing to enforce the operating agreement is a separate matter, which is covered by Section 111(a) [§ 30-6-111(1)] (stating, as a default rule, that the limited liability company "may enforce the operating agreement").

30-6-106. Governing law. — The law of this state governs:

(1) The internal affairs of a limited liability company; and

(2) The liability of a member as member and a manager as manager for the debts, obligations or other liabilities of a limited liability company.

History.

I.C., § 30-6-106, as added by 2008, ch. 176, § 1, p. 483.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Paragraph (1) — Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the operating agreement, relations among the members as members; relations between the limited liability company and a member as a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members as members. *Compare* Restatement (Second) of Conflict of Laws § 302, cmt. a (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

The operating agreement cannot alter this provision. Section 110(c)(2) [§ 30-6-110(3)(b)]. However, an operating agreement may lawfully incorporate by reference the provisions of another state's LLC statute. If done correctly, this incorporation makes the foreign statutory language part of the operating agreement, and the incorporated terms (together with the rest of the operating agreement) then govern the members (and those claiming through the members) to the extent not prohibited by this Act. *See* Section 110 [§ 30-6-110]. This approach does not switch the limited liability company's governing law to that of another state, but instead takes the provisions of another state's law and incorporates them by reference into the contract among the members.

Paragraph (2) — This paragraph certainly encompasses Section 304 [§ 30-6-304] (the liability shield) but does not necessarily encompass a claim that a member or manager is liable to a third party for (i) having purported to bind a limited liability company to the third party; or (ii) having committed a tort against the third party while acting on the limited liability company's behalf or in the course of the company's business. That liability is not by status (i.e., not "as member ... [or] as manager") but rather results from function or conduct. Contrast Section 301(b) [§ 30-6-301(2)] (stating that, although this Act does not make a member as member the agent of a limited liability company, other law may make an LLC liable for the conduct of a member).

This paragraph is stated separately from Paragraph (1), because it can be argued that the liability of members and managers to third parties is not an internal affair. *See, e.g.,* Restatement (Second) of Conflict of Laws, § 307 (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993). In any event, the rule stated in this paragraph is correct. All sensible authorities agree that, except in extraordinary circumstances, "shield-related" issues should be determined according to the law of the state of organization.

30-6-107. Supplemental principles of law. — Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

History.
I.C., § 30-6-107, as added by 2008, ch. 176, § 1, p. 483.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

30-6-108. Name. — (1) The name of a limited liability company must contain the words "limited liability company" or "limited company" or the abbreviation "L.L.C.," "LLC," "L.C.," or "LC." "Limited" may be abbreviated as "ltd." and "company" may be abbreviated as "co." If the limited liability company is a professional company, however, the name of the limited liability company must contain the words "professional company" or the abbreviations "P.L.L.C." or "PLLC."

(2) The name of a limited liability company may not contain language falsely stating or implying government affiliation.

(3) Unless authorized by subsection (4) of this section, the name of a limited liability company must be distinguishable on the records of the secretary of state from:

(a) The name of each person that is not an individual and that is incorporated, organized or authorized to transact business in this state;

(b) The limited liability company name stated in each certificate of organization that contains the statement as provided in section 30-6-201(2)(c), Idaho Code, and that has not lapsed; and

(c) Each name reserved under section 30-6-109, Idaho Code, and sections 30-1-402 and 30-1-403, Idaho Code, sections 30-3-28 and 30-3-29, Idaho Code, and section 53-2-109, Idaho Code.

(4) A limited liability company may apply to the secretary of state for authorization to use a name that does not comply with subsection (3) of this section. The secretary of state shall authorize use of the name applied for if, as to each noncomplying name:

(a) The present user, registrant or owner of the noncomplying name consents in a signed record to the use and submits an undertaking in a form satisfactory to the secretary of state to change the noncomplying name to a name that complies with subsection (3) of this section and is distinguishable in the records of the secretary of state from the name applied for; or

(b) The applicant delivers to the secretary of state a certified copy of the final judgment of a court establishing the applicant's right to use in this state the name applied for.

(5) Subject to section 30-6-805, Idaho Code, this section applies to a foreign limited liability company transacting business in this state which

has a certificate of authority to transact business in this state or which has applied for a certificate of authority.

History.

I.C., § 30-6-108, as added by 2008, ch. 176, § 1, p. 483; am. 2012, ch. 184, § 1, p. 487.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 184, added subsection (2), renumbered the subsequent subsections, and adjusted internal references accordingly.

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

Section 3 of S.L. 2012, ch. 184 declared an emergency. Approved March 29, 2012.

OFFICIAL COMMENT

Subsection (a) [(1)] is taken verbatim from ULLCA § 105(a). Except for subsection (b)(2) [(3)(b)], the rest of the section is taken from ULPA (2001) § 108.

Subsection (b)(2) [(3)(b)] — This language is necessary to protect a name contained in a filed certificate of organization that has not become effective because there are no members. If a statement of membership is not thereafter timely filed, "the certificate lapses and is void," thereby freeing the name. Section 201(e)(1).

30-6-109. Reservation of name. — (1) A person may reserve the exclusive use of the name of a limited liability company, including a fictitious or assumed name for a foreign limited liability company whose name is not available, by delivering an application to the secretary of state for filing. The application must state the name and address of the applicant and the name proposed to be reserved. If the secretary of state finds that the name applied for is available, it must be reserved for the applicant's exclusive use for a four (4) month period.

(2) The owner of a name reserved for a limited liability company may transfer the reservation to another person by delivering to the secretary of state for filing a signed notice of the transfer which states the name and address of the transferee.

History.

I.C., § 30-6-109, as added by 2008, ch. 176, § 1, p. 484.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULLCA, § 106.

Subsection (a) [(1)] — Although 120-day [four (4) month] reservation period is nonrenewable, this subsection does not prevent a person from seeking successive 120-day [four 4 month] periods of reservation.

30-6-110. Operating agreement — Scope, function and limitations. — (1) Except as otherwise provided in subsections (2) and (3) of this section, the operating agreement governs:

(a) Relations among the members as members and between the members and the limited liability company;

(b) The rights and duties under this chapter of a person in the capacity of manager;

(c) The activities of the company and the conduct of those activities; and

(d) The means and conditions for amending the operating agreement.

(2) To the extent the operating agreement does not otherwise provide for a matter described in subsection (1) of this section, this chapter governs the matter.

(3) An operating agreement may not:

(a) Vary a limited liability company's capacity under section 30-6-105, Idaho Code, to sue and be sued in its own name;

(b) Vary the law applicable under section 30-6-106, Idaho Code;

(c) Vary the power of the court under section 30-6-204, Idaho Code;

(d) Subject to subsections (4) through (7) of this section, eliminate the duty of loyalty, the duty of care, or any other fiduciary duty;

(e) Subject to subsections (4) through (7) of this section, eliminate the contractual obligation of good faith and fair dealing under section 30-6-409(4), Idaho Code;

(f) Unreasonably restrict the duties and rights stated in section 30-6-410, Idaho Code;

(g) Vary the power of a court to decree dissolution in the circumstances specified in sections 30-6-701(1)(d) and (e), Idaho Code;

(h) Vary the requirement to wind up a limited liability company's business as specified in sections 30-6-702(1) and (2)(a), Idaho Code;

(i) Unreasonably restrict the right of a member to maintain an action under part 9 of this chapter;

(j) Restrict the right to approve a merger, conversion or domestication under chapter 18, title 30, Idaho Code, to a member that will have personal liability with respect to a surviving, converted or domesticated organization; or

(k) Except as otherwise provided in section 30-6-112(2), Idaho Code, restrict the rights under this chapter of a person other than a member or manager.

(4) If not manifestly unreasonable, the operating agreement may:

(a) Restrict or eliminate the duty:

(i) As required in sections 30-6-409(2)(a) and (7), Idaho Code, to account to the limited liability company and to hold as trustee for it any property, profit or benefit derived by the member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of a limited liability company opportunity;

(ii) As required in sections 30-6-409(2)(b) and (7), Idaho Code, to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(iii) As required by sections 30-6-409(2)(c) and (7), Idaho Code, to refrain from competing with the company in the conduct of the company's business before the dissolution of the company;

(b) Identify specific types or categories of activities that do not violate the duty of loyalty;

(c) Alter the duty of care, except to authorize intentional misconduct or knowing violation of law;

(d) Alter any other fiduciary duty, including eliminating particular aspects of that duty; and

(e) Prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing under section 30-6-409(4), Idaho Code.

(5) The operating agreement may specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one (1) or more disinterested and independent persons after full disclosure of all material facts.

(6) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this chapter and imposes the responsibility on one (1) or more other members, the operating agreement may, to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit any fiduciary duty that would have pertained to the responsibility.

(7) The operating agreement may alter or eliminate the indemnification for a member or manager provided by section 30-6-408(1), Idaho Code, and may eliminate or limit a member or manager's liability to the limited liability company and members for money damages, except for:

(a) Breach of the duty of loyalty;

(b) A financial benefit received by the member or manager to which the member or manager is not entitled;

(c) A breach of a duty under section 30-6-406, Idaho Code;

(d) Intentional infliction of harm on the company or a member; or

(e) An intentional violation of criminal law.

(8) The court shall decide any claim, under subsection (4)(a) of this section, that a term of an operating agreement is manifestly unreasonable. The court:

(a) Shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and

(b) May invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:

(i) The objective of the term is unreasonable; or

(ii) The term is an unreasonable means to achieve the provision's objective.

History.

I.C., § 30-6-110, as added by 2008, ch. 176, § 1, p. 484.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

The operating agreement is pivotal to a limited liability company, and Sections 110 through 112 [§§ 30-6-110 through 30-6-112] are pivotal to this Act. They must be read together, along with Section 102(13) [§ 30-6-102(15)] (defining the operating agreement).

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the law of fiduciary duty. This section gives special attention to that question and is organized as follows:

Subsection (a) [(1)]	grants broad, *general* authority to the operating agreement
Subsection (b) [(2)]	establishes this Act as comprising the "default rules" ("gap fillers") for matters within the purview of the operating agreement but not addressed by the operating agreement
Subsection (c) [(3)]	states restrictions on the power of the operating agreement, especially but not exclusively with regard to fiduciary duties and the contractual obligation of good faith
Subsection (d) [(4)]	contains *specific* grants of authority for the operating agreement with regard to fiduciary duty and the contractual obligation of good faith; expressed so as to state restrictions on those specific grants — including the "if not manifestly unreasonable" standard
Subsection (e) [(5)]	specifically grants the operating agreement the power to provide mechanisms for approving or ratifying conduct that would otherwise violate the duty of loyalty; expressed so as to state restrictions on those mechanism — full disclosure and disinterested and independent decision makers
Subsection (f) [(6)]	specifically authorizes the operating agreement to divest a member of fiduciary duty with regard to a matter if the operating agreement is also divesting the person of responsibility for the matter (and imposing that responsibility on one or more other members)
Subsection (g) [(7)]	contains *specific* grants of authority for the operating agreement with regard to indemnification and exculpatory provisions; expressed so as to state restrictions on those specific grants
Subsection (h) [(8)]	provides rules for applying the "not manifestly unreasonable" standard established by subsection (d)

A limited liability company is as much a creature of contract as of statute, and Section 102(13) [§ 30-6-102(15)] delineates a very broad scope for "operating agreement." As a result, once an LLC comes into existence and has a member, the LLC necessarily has an

operating agreement. *See* Comment to Section 102(13) [§ 30-6-102(15)]. Accordingly, this Act refers to "the operating agreement" rather than "an operating agreement."

This phrasing should not, however, be read to require a limited liability company or its members to take any formal action to adopt an operating agreement. *Compare* Cal. Corp. Code § 17050(a) (2006) ("In order to form a limited liability company, one or more persons shall execute and file articles of organization with, and on a form prescribed by, the Secretary of State and, either before or after the filing of articles of organization, the members shall have entered into an operating agreement.")

The operating agreement is the exclusive consensual process for modifying this Act's various default rules pertaining to relationships *inter se* the members and between the members and the limited liability company. Section 110(b) [§ 30-6-110(2)]. The operating agreement also has power over "the rights and duties under this [act] of a person in the capacity of manager," subsection (a)(2) [(1)(b)], and "the obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member." Section 112(b) [§ 30-6-112(2)].

Subsection (a) [(1)] — This section describes the very broad scope of a limited liability company's operating agreement, which includes all matters constituting "internal affairs." Compare Section 106(1) [§ 30-6-106(1)] (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c) [(3)], including the broad restriction stated in paragraph (c)(11) [(3)(k)] (concerning the rights under this Act of third parties).

Subsection (a)(2) [(1)(b)] — Under this paragraph, the operating agreement has the power to affect the rights and duties of managers (including non-member managers). Because the term "[o]perating agreement .... includes the agreement as amended or restated," Section 102(13) [§ 30-6-102(15)], this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager. A non-member manager might also have rights under Section 112(a) § 30-6-112(1)].

Subsection (a)(4) [(1)(d)] — If the operating agreement does not address this matter, under subsection (b) [(2)] this Act provides the rule. The rule appears in Section 407(b)(5) [§ 30-6-407(2)(e)] and 407(c)(4)(D) [§ 30-6-407(3)(d)(iv)] (unanimous consent).

This Act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes (e.g., prohibiting modifications except when consented to in writing). *Compare* UCC § 2-209(2) (authorizing such prohibitions in a "signed agreement" for the sale of goods). However, this Paragraph (a)(4) [(1)(d)] could be read to encompass such authorization. Also, under Section 107 [§ 30-6-107] the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

Subsection (c) [(3)] — If a person claims that a term of the operating agreement violates this subsection, as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (c)(1) [(3)(a)] — Under this Act, a limited liability company is emphatically an entity, and the members lack the power to alter that characteristic.

Subsection (c)(4) [(3)(d)] — This limitation is less powerful than might first appear, because subsections (d) through (g) [(4) through (7)] specifically authorize significantly alterations to fiduciary duty. The reference to "or any other fiduciary duty" is necessary because the Act has "un-cabined" fiduciary duty. *See* Comment to Section 409 [§ 30-6-409].

Subsection (c)(9) [(3)(i)] — Arbitration and forum selection provisions are commonplace in business agreements, and this paragraph's restrictions do not reflect any special hostility to or skepticism of such provisions.

Subsection (c)(10) [(3)(j)] — Under Section 1014 [§ 30-6-1002]:

- each member is protected from being merged, converted, or domesticated "into" the status of an unshielded general partner (or comparable position) without the member having *directly* consented to either:
  - the merger, conversion, or domestication; or
  - an operating agreement provision that permits such transactions to occur with less than unanimous consent of the members; and
- merely consenting to an operating agreement provision that permits amendment of the operating agreement with less than unanimous consent of the members does not qualify as the requisite direct consent.

The sole function of subsection (c)(10) [(3)(j)] is to protect Section 1014 [§ 30-6-1002] by denying the operating agreement the power to restrict or otherwise undercut the protections of Section 1014 [§ 30-6-1002].

Subsection (c)(11) [(3)(k)] — This limitation pertains only to "the rights under this

chapter of" third parties. The extent to which an operating agreement can affect other rights of third parties is a question for other law, particularly the law of contracts.

Subsection (d) [(4)] — Delaware recently amended its LLC statute to permit an operating agreement to fully "eliminate" fiduciary duty within an LLC. This Act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rule and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some have power over the interests of others. As one source has explained:

> The open-ended nature of fiduciary duty reflects the law's long-standing recognition that devious people can smell a loophole a mile away. For centuries, the law has assumed that (1) power creates opportunities for abuse and (2) the devious creativity of those in power may outstrip the prescience of those trying, through ex ante contract drafting, to constrain that combination of power and creativity.

Carter G. Bishop and Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law, ¶ 14.05[4][a][ii]

Subsection (h) [(8)] contains rules for applying the "not manifestly unreasonable" standard.

Subsection (d)(1) [(4)(a)] — Subject to the "not manifestly unreasonable" standard, this paragraph empowers the operating agreement to eliminate all aspects of the duty of loyalty listed in Section 409 [§ 30-6-409]. The contractual obligation of good faith would remain, see subsections(c)(5) and (d)(5) [(3)(e) and (4)(e)], as would any other, uncodified aspects of the duty of loyalty. *See* Comment to Section 409 [§ 30-6-409] decision to "uncabin" fiduciary duty). *See also* subsection (d)(4) [(4)(d)] (empowering the operating agreement to "alter any other fiduciary duty, including eliminating particular aspects of that duty").

Subsection (d)(3) [(4)(c)] — The operating agreement's power to affect this Act's duty of care both parallels and differs from the agreement's power to affect this Act's duty of loyalty as well as any other fiduciary duties not codified in the statute. With regard to all fiduciary duties, the operating agreement is subject to the "manifestly unreasonable" standard. The differences concern: (i) the extent of the operating agreement's power to restrict the duty; and (ii) the power of the operating agreement to provide indemnity or exculpation for persons subject to the duty.

duty	**extent of operating agreement's power to restrict the duty (subject to the "manifestly unreasonable" standard) Section 110(d)(1), (3) and (4) [§ 30-6-110(4)(a), (c) and (d)]**	**power of the operating agreement to provide indemnity or exculpation w/r/t breach of the duty Section 110(g) [§ 30-6-110(7)]**
loyalty	restrict or completely eliminate	none
care	alter, but not eliminate; specifically may not authorize intentional misconduct or knowing violation of law	complete
other fiduciary duties, not codified in the statute	restrict or completely eliminate Section 110(4) [§ 30-6-110(4)]	complete

Subsection (e) [(5)] — Section 409(f) [§ 30-6-409(6)] states the Act's default rule for authorization or ratification — unanimous consent. This subsection specifically empowers the operating agreement to provide alternate mechanisms but, in doing so, imposes significant restrictions — namely, any alternate mechanism must involve full disclosure to, and the disinterestedness and independence of, the decision makers. These restrictions are consonant with ordinary notions of authorization and ratification.

This Act provides four separate methods through which those with management power in a limited liability company can proceed with conduct that would otherwise violate the duty of loyalty:

Method	Statutory Authority
The operating agreement might eliminate the duty or otherwise permit the conduct, without need for further authorization or ratification.	Section 110(d)(1) and (2) [§ 30-6-110(4)(a) and (b)]
The conduct might be authorized or ratified by all the members after full disclosure.	Section 409(f) [§ 30-6-409(6)]
The operating agreement might establish a mechanism other than the informed consent for authorizing or ratifying the conduct.	Section 110(e) [§ 30-6-110(5)]
In the case of self-dealing the conduct might be successfully defended as being or having been fair to the limited liability company.	Section 409(e) [§ 30-6-409(5)]

Subsection (f) [(6)] — This subsection is intended to make clear that — regardless of the strictures stated elsewhere in this section — in the specified circumstances the operating agreement can entirely strip away the pertinent fiduciary duties.

Subsection (g) [(7)] This subsection specifically empowers the operating agreement to address matters of indemnification and exculpation but subjects that power to stated limitations. Those limitations are drawn from the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). Delaware led the response with Del. Code Ann. tit. 8, § 102(b)(7) (2006), and a number of LLC statutes have similar provisions. *E.g.* Ga. Code Ann. § 14-11-305(4)(A) (2006); Idaho Code Ann. § 53-624(1) (2006). For an extreme example, see Va. Code Ann. § 13.1-1025 (2006) (establishing limits of monetary liability as the default rule).

The restrictions stated in paragraphs (1) through (5) [(a) through (e)] apply both to indemnification and exculpation. The power to "alter or eliminate the indemnification ... provided by Section 30-6-408(1)" includes the power to expand or reduce that indemnification.

Subsection (g)(4) [(7)(d)] — Due to this paragraph, an exculpatory provision cannot shield against a member's claim of oppression. *See* Section 701(a)(5)(B) and (b) [§ 30-6-701(1)(e)(ii) and (2)].

Subsection (h) [(8)] — The "not manifestly unreasonable standard" became part of uniform business entity statutes when RUPA imported the concept from the Uniform Commercial Code. This subsection provides rules for applying that standard, which are necessary because:

- Determining unreasonableness *inter se* owners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.
- If loosely applied, the standard would permit a court to rewrite the members' agreement, which would destroy the balance this Act seeks to establish between freedom of contract and fiduciary duty.
- Case law research indicates that courts have tended to disregard the significance of the word "manifestly."
- Some decisions have considered reasonableness as of the time of the complaint, which means that a prospectively reasonable allocation of risk could be overturned because it functioned as agreed.

If a person claims that a term of the operating agreement in manifestly unreasonable under subsections (d) and (h) [(4) and (8)], as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (h)(1) [(8)(a)] — The significance of the phrase "as of the time the challenged term became part of the operating agreement" is best shown by example.

EXAMPLE: An LLC's operating agreement as initially adopted includes a provision subjecting a matter to "the manager's sole, reasonable discretion." A year later, the agreement is amended to delete the word "reasonable." Later, a member claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under subsection (h)(1) [(8)(a)] is when the agreement was amended, not when the agreement was initially adopted.

EXAMPLE: When a particular manager-managed LLC comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the LLC's sole

manager. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the LLC's start-up. In order to induce the individual to accept the position of sole manager, the members are willing to have the operating agreement significantly limit the manager's fiduciary duties. Several years later, when the LLC's operations have turned prosaic and the manager's talents and background are not nearly so crucial, a member challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under subsection (h)(1) [(8)(a)] is when the LLC began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

30-6-111. Operating agreement — Effect on limited liability company and persons becoming members — Preformation agreement. — (1) A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement.

(2) A person that becomes a member of a limited liability company is deemed to assent to the operating agreement.

(3) Two (2) or more persons intending to become the initial members of a limited liability company may make an agreement providing that upon the formation of the company the agreement will become the operating agreement. One (1) person intending to become the initial member of a limited liability company may assent to terms providing that upon the formation of the company the terms will become the operating agreement.

History.

I.C., § 30-6-111, as added by 2008, ch. 176, § 1, p. 486.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (a) [(1)] — This subsection does not consider whether a limited liability company is an indispensable party to a suit concerning the operating agreement. That is a question of procedural law, which can determine whether federal diversity jurisdiction exists.

Subsection (b) [(2)] — Given the possibility of oral and implied-in-fact components to the operating agreement, see Comment to Section 110(a)(4) [§ 30-6-110(1)(d)], a person becoming a member of an existing limited liability company should take precautions to ascertain fully the contents of the operating agreement.

Subsection (c) [(3)] — The second sentence refers to "assent to terms" rather than "make an agreement" because, under venerable principles of contract law, an agreement presupposes at least two parties. This Act specifically defines the operating agreement to include a sole member, Section 102(13) [§ 30-6-102(15)], but a preformation arrangement is not an operating agreement. An operating agreement is among "members," and, under this Act, the earliest a person can become a member is upon the formation of the limited liability company. Section 401 [§ 30-6-401].

30-6-112. Operating agreement — Effect on third parties and relationship to records effective on behalf of limited liability company. — (1) An operating agreement may specify that its amendment

requires the approval of a person that is not a party to the operating agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(2) The obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member are governed by the operating agreement. Subject only to any court order issued under section 30-6-503(2)(b), Idaho Code, to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation or other liability of the limited liability company or its members to the person in the person's capacity as a transferee or dissociated member.

(3) If a record that has been delivered by a limited liability company to the secretary of state for filing and has become effective under this chapter contains a provision that would be ineffective under section 30-6-110(3), Idaho Code, if contained in the operating agreement, the provision is likewise ineffective in the record.

(4) Subject to subsection (3) of this section, if a record that has been delivered by a limited liability company to the secretary of state for filing and has become effective under this chapter conflicts with a provision of the operating agreement:

(a) The operating agreement prevails as to members, dissociated members, transferees and managers; and

(b) The record prevails as to other persons to the extent they reasonably rely on the record.

History.

I.C., § 30-6-112, as added by 2008, ch. 176, § 1, p. 486.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

ANALYSIS

Breach of fiduciary duty.
Fiduciary duties.
Willful misconduct.

Breach of Fiduciary Duty.

Former member's claim of breach of a limited liability company operating agreement was improperly dismissed on summary judgment in part because there were disputed facts as to whether the remaining members acted in bad faith or in breach of fiduciary duties in terminating the former member. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Fiduciary Duties.

Members of an LLC owe one another the fiduciary duties of trust and loyalty. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Whether a fiduciary has breached his duties of trust and loyalty is a question of fact. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Willful Misconduct.

Where a member of a limited liability company in the construction business actively solicited business away from the company for his own personal benefit, there was sufficient evidence showing that his actions amounted to willful misconduct for purposes of establishing his liability. The district court erred in granting a directed verdict with respect to the company's willful misconduct claim. Todd v. Sullivan Constr. LLC, 146 Idaho 118, 191 P.3d 196 (2008).

OFFICIAL COMMENT

Subsection (a) [(1)] — This subsection, derived from Del. Code Ann. tit. 6, § 18-302(e), permits a non-member to have veto rights over amendments to the operating agreement. Such veto rights are likely to be sought by lenders but may also be attractive to non-member managers.

> **EXAMPLE:** A non-member manager enters into a management contract with the LLC, and that agreement provides in part that the LLC may remove the manager without cause only with the consent of members holding 2/3 of the profits interests. The operating agreement contains a parallel provision, but the non-member manager is not a party to the operating agreement. Later the LLC members amend the operating agreement to change the quantum to a simple majority and thereafter purport to remove the manager without cause. Although the LLC has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the LLC has the power under Section 110(a)(2) [§ 30-6-110(1)(b)] to effect the removal — unless the operating agreement provided the non-member manager a veto right over changes in the quantum provision.

The subsection does not refer to member veto rights because, unless otherwise provided in the operating agreement, the consent of each member is necessary to effect an amendment. Section 407(b)(5) and (c)(4)(D) [§ 30-6-407(2)(e) and (3)(d)(iv)].

Subsection (b) [(2)] — The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. (Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. See Section 603(a)(3) [§ 30-6-603(1)(c).).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

Bauer v. Blomfield Co./Holden Joint Venture, 849 P.2d 1365 (Alaska 1993) illustrates this point nicely. The case arose after all the partners had approved a commission arrangement with a third party and the arrangement dried up all the partnership profits. When an assignee of a partnership interest objected, the court majority flatly rejected not only the claim but also the assignee's right to assert the claim. A mere assignee "was not entitled to complain about a decision made with the consent of all the partners." *Id.* at 1367. A footnote explained, "We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest." *Id.* at 1367, n. 2.

The dissent, invoking the law of contracts, asserted that the majority had turned the statutory protection of the partners' management prerogatives into an instrument for abuse of assignees:

> It is a well-settled principle of contract law that an assignee steps into the shoes of an assignor as to the rights assigned. Today, the court summarily dismisses this principle in a footnote and leaves the assignee barefoot.... As interpreted by the court, the [partnership] statute now allows partners to deprive an assignee of profits to which he is entitled by law for whatever outrageous motive or reason. The court's opinion essentially leaves the assignee of a partnership interest without remedy to enforce his right.

Id. at 1367-8 (Matthews, J., dissenting).

The *Bauer* majority is consistent with the limited but long-standing case law in this area (all of it pertaining to partnerships rather than LLCs). This subsection follows the Bauer majority and other cases by expressly subjecting transferees and dissociated members to operating agreement amendments made after the transfer or dissociation. *Compare* UPA § 32(2) (permitting an assignee to seek judicial dissolution of an at-will general partnership at any time and of a partnership for a term or undertaking if partnership continues in existence after the completion of the term or undertaking); RUPA § 801(6) (same except adding the require-

ment that the court determine that dissolution is equitable); ULLCA, § 801(5) (same as RUPA); ULLCA, § 801(4) (permitting a dissociated member to seek dissolution on the grounds *inter alia* of oppressive conduct). *See also* UCC §§ 9-405(a) and (b) and Restatement (Second) of Contracts § 338 (1981) (recognizing a duty of good faith applicable to the modification of a contract when an assignment of contract is in effect).

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation, is a question for other law.

Subsection (d) [(4)] — A limited liability company is a creature of contract as well as a creature of statute. It will be possible, albeit improvident, for the operating agreement to be inconsistent with the certificate of organization or other public filings pertaining to the limited liability company. For those circumstances, this subsection provides rules for determining which source of information prevails.

For members, managers and transferees, the operating agreement is paramount. For third parties seeking to invoke the public record, actual knowledge of that record is necessary and notice, deemed notice, and deemed knowledge under Section 103 [§ 30-6-103] are irrelevant. A third party wishing to enforce the public record over the operating agreement must show reasonable reliance on the public record, and reliance presupposes knowledge.

The mere fact that a term is present in a publicly-filed record and not in the operating agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which (i) one of the specified filed records contains information in addition to, but not inconsistent with, the operating agreement, and (ii) a person, other than a member or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation.

Section 110(a)(4) [§ 30-6-110(1)(d)] might also be relevant to the subject matter of this subsection. Absent a contrary provision in the operating agreement, language in an LLC's certificate of organization might be evidence of the members' agreement and might thereby constitute or at least imply a term of the operating agreement.

This subsection does not apply to records delivered to the [Secretary of State] for filing on behalf of persons other than a limited liability company.

30-6-113. Designated office and registered agent. — (1) A limited liability company shall designate and continuously maintain in this state:

(a) An office, which need not be a place of its activity in this state; and

(b) A registered agent.

(2) A foreign limited liability company that has a certificate of authority under section 30-6-802, Idaho Code, shall designate and continuously maintain in this state a registered agent.

History.

I.C., § 30-6-113, as added by 2008, ch. 176, § 1, p. 487.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULPA (2001), § 114.

IDAHO REPORTER'S COMMENT

The Idaho Registered Agents Act regulates the appointment, duties, change and resignation of registered agents and service of process upon a registered agent. Provisions of RULLCA that address these issues have been modified or removed from the Idaho Act. (In particular,

RULLCA sections 115 and 116 have been removed in their entirety.) Cross-references to the Idaho Registered Agents Act have been inserted where appropriate throughout the Idaho Act.

30-6-114. Change of designated office. — (1) A limited liability company or foreign limited liability company may change its designated office by delivering to the secretary of state for filing a statement of change containing:

(a) The name of the company;

(b) The street and mailing addresses of its current designated office; and

(c) If the current designated office is to be changed, the street and mailing addresses of the new designated office.

(2) Subject to section 30-6-205(3), Idaho Code, a statement of change is effective when filed by the secretary of state.

History.

I.C., § 30-6-114, as added by 2008, ch. 176, § 1, p. 487.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 115, which is based on ULLCA § 109.

Subsection (a) [(1)] — This subsection uses "may" rather than "shall" because other avenues exist. A limited liability company may also change the information by amending its certificate of organization, Section 202 [§ 30-6-202], or through its annual report. Section 209(e) [§ 30-6-209(5)]. A foreign limited liability company may use its annual report. Section 209(e) [§ 30-6-209(5)]. However, neither a limited liability company nor a foreign limited liability company may wait for the annual report if the information described in the public record becomes inaccurate. *See* Sections 207 [§ 30-6-207] (imposing liability for false information in record) and 116(b) [not adopted in Idaho] (providing for substitute service).

IDAHO REPORTER'S COMMENT

See Idaho Reporter's Comments to Idaho Code § 30-6-113.

Part 2. Formation — Certificate of Organization and Other Filings

30-6-201. Formation of limited liability company — Certificate of organization. — (1) One (1) or more persons may act as organizers to form a limited liability company by signing and delivering to the secretary of state for filing a certificate of organization.

(2) A certificate of organization must state:

(a) The name of the limited liability company, which must comply with section 30-6-108, Idaho Code;

(b) The street and mailing addresses of the initial designated office and the information required by section 30-405(1), Idaho Code;

(c) The name and mailing address of at least one (1) member or manager of the limited liability company; and

(d) If the limited liability company is a professional company, a statement to that effect and the principal profession or professions for which members are duly licensed or otherwise legally authorized to render professional services.

(3) Subject to section 30-6-112(3), Idaho Code, a certificate of organization may also contain statements as to matters other than those required by subsection (2) of this section. However, a statement in a certificate of organization is not effective as a statement of authority as defined in section 30-6-302, Idaho Code. The secretary of state shall not accept operating agreements for filing.

(4) The following rules apply to the filing of a certificate of organization:

(a) A limited liability company is formed when the secretary of state has filed the certificate of organization, unless the certificate states a delayed effective date pursuant to section 30-6-205(3), Idaho Code.

(b) If the certificate states a delayed effective date, a limited liability company is not formed if, before the certificate takes effect, a statement of cancellation is signed and delivered to the secretary of state for filing and the secretary of state files the certificate of cancellation.

(c) Subject to any delayed effective date and except in a proceeding by this state to dissolve a limited liability company, the filing of the certificate of organization by the secretary of state is conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company.

History.

I.C., § 30-6-201, as added by 2008, ch. 176, § 1, p. 487.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to formation of limited liability company and addition or disassociation of members thereto. 43 A.L.R.6th 611.

OFFICIAL COMMENT

No topic received more attention or generated more debate in the drafting process for this Act than the question of the "shelf LLC" — i.e., an LLC formed without having at least one member upon formation. Reasonable minds differed (occasionally intensely) as to whether the "shelf" approach (i) is necessary to accommodate current business practices; and (ii) somehow does conceptual violence to the partnership antecedents of the limited liability company.

The 2006 Annual Meeting Draft provided for a "limited shelf" — a shelf that lacked capacity to conduct any substantive activities:

(a) Except as otherwise provided in subsection (b), a limited liability company has

the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities.

(b) Until a limited liability company has or has had at least one member, the company lacks the capacity to do any act or carry on any activity except:

(1) delivering to the [Secretary of State] for filing a statement of change under Sections 114, an amendment to the certificate under Section 202, a statement of correction under Section 206, an annual report under section 209, and a statement of termination under Section 702(b)(2)(F);

(2) admitting a member under section 401; and

(3) dissolving under Section 701.

(c) A limited liability company that has or has had at least one member may ratify an act or activity that occurred when the company lacked capacity under subsection (b).

However, when the Conference considered the 2006 Annual Meeting Draft, the Drafting Committee itself proposed an amendment, and the Conference agreed. A product of intense discussion and compromise with several ABA Advisors, the amendment substituted a double filing and "embryonic certificate" approach. An organizer may deliver for filing a certificate of organization without the company having any members and the filing officer will file the certificate, but:

- the certificate as delivered to the filing officer must acknowledge that situation, Subsection (b)(3) [not adopted in Idaho];
- the limited liability company is not formed until and unless the organizer timely delivers to the filing officer a notice that the company has at least one member, Subsection (e)(1) [not adopted in Idaho]; and
- if the organizer does not timely deliver the required notice, the certificate lapses and is void. *Id.*

The Conference recommends a 90-day "window" for filing the notice, which must state "the date on which a person or persons became the company's initial member or members." When the filing officer files that notice, the company is deemed formed as of the date stated in the notice. Subsection (e)(2) [not adopted in Idaho].

Thus, under this Act, the delivery to the filing officer of a certificate of organization has different consequences, depending on whether the certificate contains the "no members" statement as provided by subsection (b)(3) [not adopted in Idaho].

does the certificate contain the "no members" statement under subsection (b)(3) [not adopted in Idaho]	**by delivering the certificate for filing, what is the organizer affirming, per Section 207(c) [§ 30-6-207(3)], about members**	**effect of the filing officer filing the certificate**	**logical relationship of the filed certificate to the formation of the LLC**
no	that the LLC will have at least one member upon formation	LLC is formed, subject to any delayed effective date	necessary and sufficient
yes	that the LLC will have no members when the filing officer files the certificate	the document is part of the public record, protects the name, and starts the 90-day clock ticking	necessary but not sufficient

Subsection (b) [(2)] — This Act does not require the certificate of organization to designate whether the limited liability company is manager-managed or member-managed. Under this Act, those characterizations pertain principally to *inter se* relations, and the Act therefore looks to the operating agreement to make the characterization. *See* Sections 102(10) and (12) [§ 30-6-102(11) and (13); 407(a) [§ 30-6-407(1)].

Subsection (d) [(4)] — This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization does not contain a statement as provided in subsection (b)(3) [not adopted in Idaho] — i.e., if the limited liability company

will have at least one member when the filing officer files the certificate.

Subsection (e) [not adopted in Idaho] — This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization contains a statement as provided in subsection (b)(3) [not adopted in Idaho] — i.e., if the limited liability company will not have at least one member when the filing officer files the certificate.

This pathway requires a second filing in order to form the limited liability company: "a notice stating (A) that the limited liability company has at least one member; and (B) the date on which a person or persons became the company's initial member or members." Subsection (e)(1) [not adopted in Idaho].

In this pathway, a certificate of organization may not itself state a delayed effective date, Section 205(c) [§ 30-6-205(3)], because:

- the reason to state a delayed effective date in a certificate of organization is to set the date on which the limited liability company is formed, Section 205(c) [§ 30-6-205(3)]; and
- when a certificate contains a statement as provided in subsection (b)(3) [not adopted in Idaho], this Act mandates when (if at all) the limited liability company is deemed formed — i.e., "as of the date of initial membership stated in the notice delivered" to the filing officer as the second filing. Subsection (e)(2) [not adopted in Idaho].

IDAHO REPORTER'S COMMENT

"Shelf" registrations of limited liability companies are not permitted under the Idaho Act. A limited liability company may have multiple members, but it is required to have at least one member when it is formed. A manager or the organizer may act in behalf of the member(s) in filing the certificate of organization. No manager is required; however, the person signing the certificate of organization shall be the organizer, whether that person is also the initial member or a manager acting in behalf of the initial member.

The Secretary of State is prohibited from accepting an operating agreement for filing as a certificate of organization.

30-6-201A. Professional company. — (1) Section 30-6-201, Idaho Code, shall not be deemed to authorize a professional company to render allied professional services where the laws pertaining to specific professions or the codes of ethics or professional responsibility of any of the professions involved in such a proposed professional company prohibit such a combination of professional services.

(2) No professional company may render professional services in this state except through its managers, members, employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. The term "employee," as used in this section, does not include clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

(3) Nothing contained in this section shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional services or to the standards for professional conduct. Notwithstanding section 30-6-304(1), Idaho Code, any manager, member, agent or employee of a professional company organized under this chapter shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the professional company to the person for whom such professional services

were being rendered. The professional company shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its managers, members, agents or employees while they are engaged on behalf of the professional company in the rendering of professional services.

(4) The relationship of a person, whether as an individual, shareholder of a professional corporation, partner of a partnership or member of a professional company, to a professional company organized under the provisions of this chapter with which such person is associated, whether as manager, member or employee, shall in no way modify or diminish the jurisdiction over him of the governmental authority or state agency which licensed, certified or registered him for a particular profession.

(5) No professional company may offer membership to or accept as a member anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the company was organized or professional corporations, partnerships or limited liability companies, all of whose shareholders, partners or members are duly licensed or otherwise legally authorized to render the same specific professional services as those for which the professional company was organized. No member of a professional company shall enter into a voting trust agreement or any other type of agreement vesting another person with the authority to exercise the voting power of his membership.

(6) If any manager, member, agent or employee of a professional company who has been rendering professional services within this state accepts employment that, pursuant to existing law, places restrictions or limitations upon his continued rendering of such professional services, he shall cease to be a member in such professional company in accordance with the provisions of section 30-6-602(15), Idaho Code, and the remaining members of the professional company shall take such action as is required to terminate such membership.

(7) No member of a professional company may sell or transfer his membership in such professional company except to another individual, professional corporation, partnership or limited liability company eligible to be a member of such professional company and except pursuant to the provisions of section 30-6-502, Idaho Code.

(8) The provisions of this section shall not be considered as repealing, modifying or restricting the applicable provisions of law regulating the several professions except insofar as such laws conflict with this section.

History.

I.C., § 30-6-201A, as added by 2008, ch. 176, § 1, p. 488.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Decisions Under Prior Law

Real Estate Agents.

Including real estate agents as rendering professional services would be inconsistent with the legislative intent in establishing a definition of professional services where a real estate agent only had to have a high school equivalent degree and pass a 90-hour classroom or correspondence course, and in order for a service to be professional, it had to be comparable to those occupations listed in terms of specialized higher education. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

IDAHO REPORTER'S COMMENT

Section 201A has been added to the Idaho Act to authorize the organization of professional limited liability companies. These provisions are consistent with Section 53-615 of the predecessor Idaho Limited Liability Company Act (Idaho Code Sections 53-601 et seq.) and also with the Idaho Professional Service Corporation Act (Idaho Code Sections 30-1301 *et seq.*). In addition to Section 201A, the following sections of the Idaho Act address professional limited liability companies: 30-6-102(1), (19) and (20) (definitions of "allied professional services", "membership" or "membership interest", "professional company" and "professional service"); 30-6-105 (powers); 30-6-108 (name); 30-6-201(2)(d) (certificate of organization); 30-6-502(1)(a) (transfer of transferable interest); 30-6-602(15) (events causing dissociation as a member); 30-6-801(1)(b) (foreign PLLC).

30-6-202. Amendment or restatement of certificate of organization. — (1) A certificate of organization may be amended or restated at any time.

(2) To amend its certificate of organization, a limited liability company must deliver to the secretary of state for filing an amendment stating:

(a) The name of the company;

(b) The date of filing of its certificate of organization; and

(c) The changes the amendment makes to the certificate as most recently amended or restated.

(3) To restate its certificate of organization, a limited liability company must deliver to the secretary of state for filing a restatement, designated as such in its heading, stating:

(a) In the heading or in an introductory paragraph, the company's present name and the date of the filing of the company's initial certificate of organization;

(b) If the company's name has been changed at any time since the company's formation, each of the company's former names; and

(c) The changes the restatement makes to the certificate as most recently amended or restated.

(4) Subject to sections 30-6-112(3) and 30-6-205(3), Idaho Code, an amendment to or restatement of a certificate of organization is effective when filed by the secretary of state.

(5) If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate of organization was inaccurate when the certificate was filed or has become inaccurate owing to changed circumstances, the member or manager shall promptly:

(a) Cause the certificate to be amended; or

(b) If appropriate, deliver to the secretary of state for filing a statement of change under section 30-6-114, Idaho Code, or section 30-408, Idaho Code, or a statement of correction under section 30-6-206, Idaho Code.

History.

I.C., § 30-6-202, as added by 2008, ch. 176, § 1, p. 489.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (e) [(5)] — This subsection is taken from ULPA (2001) § 202(c), which imposes the responsibility on general partners. The original ULLCA had no comparable provision.

This subsection imposes an obligation directly on the members and managers rather than on the limited liability company. A member or manager's failure to meet the obligation exposes the member or manager to liability to third parties under Section 207(a)(2) [§ 30-6-207(1)(b)] and might constitute a breach of the member or manager's duties under Section 409(c) and (g)(1) [§ 30-6-409(3) and (7)(a)]. In addition, an aggrieved person may seek a remedy under Section 204 [§ 30-6-204] (Signing and Filing Pursuant to Judicial Order).

Like other provisions of the Act requiring records to be delivered to the filing officer for filing, this section is not subject to change by the operating agreement. *See* Section 110(c)(11) [§ 30-6-110(3)(k)] (precluding the operating agreement from "restrict[ing] the rights under this chapter of a person other than a member or manager").

30-6-203. Signing of records to be delivered for filing to secretary of state. — (1) A record delivered to the secretary of state for filing pursuant to this chapter must be signed as follows:

(a) Except as otherwise provided in paragraphs (b) through (d) of this subsection, a record signed on behalf of a limited liability company must be signed by a person authorized by the company.

(b) A limited liability company's initial certificate of organization must be signed by at least one (1) person acting as an organizer.

(c) A record filed on behalf of a dissolved limited liability company that has no members must be signed by the person winding up the company's activities under section 30-6-702(3), Idaho Code, or a person appointed under section 30-6-702(4), Idaho Code, to wind up those activities.

(d) A statement of cancellation under section 30-6-201(4)(b), Idaho Code, must be signed by each organizer that signed the initial certificate of organization, but a personal representative of a deceased or incompetent organizer may sign in the place of the decedent or incompetent.

(e) A statement of denial by a person under section 30-6-303, Idaho Code, must be signed by that person.

(f) Any other record must be signed by the person on whose behalf the record is delivered to the secretary of state.

(2) Any record filed under this chapter may be signed by an agent.

(3) Any record filed under this chapter must be signed in a manner acceptable to the secretary of state.

History.
I.C., § 30-6-203, as added by 2008, ch. 176, § 1, p. 490.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (b) [(2)] — This subsection does not require that the agent's authority be memorialized in a writing or other record. However, a person signing as an agent "affirms under penalty of perjury that [the assertion of agent status is] ... accurate." Section 207(c) [§ 30-6-207(3)].

30-6-204. Signing and filing pursuant to judicial order. — (1) If a person required by this chapter to sign a record or deliver a record to the secretary of state for filing under this chapter does not do so, any other person that is aggrieved may petition the district court to order:

(a) The person to sign the record;

(b) The person to deliver the record to the secretary of state for filing; or

(c) The secretary of state to file the record unsigned.

(2) If a petitioner under subsection (1) of this section is not the limited liability company or foreign limited liability company to which the record pertains, the petitioner shall make the company a party to the action.

History.
I.C., § 30-6-204, as added by 2008, ch. 176, § 1, p. 491.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 205, which is based on RULPA § 205, which was the source of ULLCA § 210.

Subsection (a)(3) [(1)(c)] — A record filed under this paragraph is effective without being signed.

30-6-205. Delivery to and filing of records by secretary of state — Effective time and date. — (1) A record authorized or required to be delivered to the secretary of state for filing under this chapter must be captioned to describe the record's purpose, be in a medium permitted by the secretary of state, and be delivered to the secretary of state. If the filing fees have been paid, unless the secretary of state determines that a record does not comply with the filing requirements of this chapter, the secretary of state shall file the record and:

(a) For a statement of denial under section 30-6-303, Idaho Code, send a copy of the filed statement and a receipt for the fees to the person on whose behalf the statement was delivered for filing and to the limited liability company; and

(b) For all other records, send a copy of the filed record and a receipt for the fees to the person on whose behalf the record was filed.

(2) Upon request and payment of the requisite fee, the secretary of state shall send to the requester a certified copy of a requested record.

(3) Except as otherwise provided in section 30-6-206, Idaho Code, a record delivered to the secretary of state for filing under this chapter may specify an effective time and a delayed effective date. Subject to sections 30-408, 30-6-201(4)(a) and 30-6-206, Idaho Code, a record filed by the secretary of state is effective:

(a) If the record does not specify either an effective time or a delayed effective date, on the date and at the time the record is filed as evidenced by the secretary of state's endorsement of the date and time on the record;

(b) If the record specifies an effective time but not a delayed effective date, on the date the record is filed at the time specified in the record;

(c) If the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of:

(i) The specified date; or

(ii) The ninetieth day after the record is filed; or

(d) If the record specifies an effective time and a delayed effective date, at the specified time on the earlier of:

(i) The specified date; or

(ii) The ninetieth day after the record is filed.

History.

I.C., § 30-6-205, as added by 2008, ch. 176, § 1, p. 491.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 206, which was based on ULLCA § 206.

This Act uses the concept of "filing" to refer to the official act of the Secretary of State, which is typically preceded by a person "delivering" some record "to the Secretary of State for filing."

Subsection (c)(3)(B) and 4(B) [3(c)(ii) and (d)(ii)] — If a person delivers to the Secretary of State for filing a record that contains an over-long delay in the effective date, the Secretary of State: (i) will not reject the record; and (ii) is neither required nor authorized to inform the person that this Act will truncate the period of delay specified in the record.

30-6-206. Correcting filed record. — (1) A limited liability company or foreign limited liability company may deliver to the secretary of state for filing a statement of correction to correct a record previously delivered by

the company to the secretary of state and filed by the secretary of state, if at the time of filing the record contained inaccurate information or was defectively signed.

(2) A statement of correction under subsection (1) of this section may not state a delayed effective date and must:

(a) Describe the record to be corrected, including its filing date, or attach a copy of the record as filed;

(b) Specify the inaccurate information and the reason it is inaccurate or the manner in which the signing was defective; and

(c) Correct the defective signature or inaccurate information.

(3) When filed by the secretary of state, a statement of correction under subsection (1) of this section is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed:

(a) For the purposes of section 30-6-103(4), Idaho Code; and

(b) As to persons that previously relied on the uncorrected record and would be adversely affected by the retroactive effect.

History.
I.C., § 30-6-206, as added by 2008, ch. 176, § 1, p. 492.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 207, which was based on ULLCA § 207.

30-6-207. Liability for inaccurate information in filed record. — (1) If a record delivered to the secretary of state for filing under this chapter and filed by the secretary of state contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from:

(a) A person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(b) Subject to subsection (2) of this section, a member of a member-managed limited liability company or the manager of a manager-managed limited liability company, if:

(i) The record was delivered for filing on behalf of the company; and

(ii) The member or manager had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the member or manager reasonably could have:

1. Effected an amendment under section 30-6-202, Idaho Code;
2. Filed a petition under section 30-6-204, Idaho Code; or

3. Delivered to the secretary of state for filing a statement of change under section 30-6-114, Idaho Code, or section 30-408, Idaho Code, or a statement of correction under section 30-6-206, Idaho Code.

(2) To the extent that the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the company to the secretary of state for filing under this chapter and imposes that responsibility on one (1) or more other members, the liability stated in subsection (1)(b) of this section applies to those other members and not to the member that the operating agreement relieves of the responsibility.

(3) An individual who signs a record authorized or required to be filed under this chapter affirms under penalty of perjury that the information stated in the record is accurate.

History.
I.C., § 30-6-207, as added by 2008, ch. 176, § 1, p. 492.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULPA (2001) § 208, which expanded on ULLCA § 209.

Section (a)(2)(B) [(1)(b)(ii)] — This subparagraph implies that doing any of the acts listed in clauses (i) through (iii) [1. through 3.] will preclude liability arising from subsequent reliance. In this connection, Clause (a)(2)(B)(ii) [(1)(b)(ii)(2.)] warrants special attention, because that act (filing a petition in court) can occur without any immediate effect on the records relevant to a limited liability company maintained by the filing officer. The other clauses refer to acts that (assuming no filing backlog) affect that public record immediately.

30-6-208. Certificate of existence or authorization. — (1) The secretary of state, upon request and payment of the requisite fee, shall furnish to any person a certificate of existence for a limited liability company if the records filed in the office of the secretary of state show that the company has been formed under section 30-6-201, Idaho Code, and the secretary of state has not filed a statement of termination pertaining to the company. A certificate of existence must state:

(a) The company's name;

(b) That the company was duly formed under the laws of this state and the date of formation;

(c) Whether all fees due under this chapter or other law to the secretary of state have been paid;

(d) Whether the company's most recent annual report required by section 30-6-209, Idaho Code, has been filed by the secretary of state;

(e) Whether the secretary of state has administratively dissolved the company;

(f) Whether the company has delivered to the secretary of state for filing a statement of dissolution;

(g) That a statement of termination has not been filed by the secretary of state; and

(h) Other facts of record in the office of the secretary of state which are specified by the person requesting the certificate.

(2) The secretary of state, upon request and payment of the requisite fee, shall furnish to any person a certificate of authorization for a foreign limited liability company if the records filed in the office of the secretary of state show that the secretary of state has filed a certificate of authority, has not revoked the certificate of authority, and has not filed a notice of cancellation. A certificate of authorization must state:

(a) The company's name and any alternate name adopted under section 30-6-805(1), Idaho Code, for use in this state;

(b) That the company is authorized to transact business in this state;

(c) Whether all fees due under this chapter or other law to the secretary of state have been paid;

(d) Whether the company's most recent annual report required by section 30-6-209, Idaho Code, has been filed by the secretary of state;

(e) That the secretary of state has not revoked the company's certificate of authority and has not filed a notice of cancellation; and

(f) Other facts of record in the office of the secretary of state which are specified by the person requesting the certificate.

(3) Subject to any qualification stated in the certificate, a certificate of existence or certificate of authorization issued by the secretary of state is conclusive evidence that the limited liability company is in existence or the foreign limited liability company is authorized to transact business in this state.

History.

I.C., § 30-6-208, as added by 2008, ch. 176, § 1, p. 493.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001), § 209, which was based on ULLCA, § 208.

The information provided in a certificate of existence or authorization is, of course, current only as of the date of the certificate.

30-6-209. Annual report for secretary of state. — (1) Each year, a limited liability company or a foreign limited liability company authorized to transact business in this state shall deliver to the secretary of state for filing a report that states:

(a) The name of the company;

(b) The information required by section 30-405(1), Idaho Code;

(c) The street and mailing addresses of the company's designated office;

(d) The street and mailing addresses of its principal office;

(e) The name and mailing address of at least one (1) member or manager; and

(f) In the case of a foreign limited liability company, the state or other jurisdiction under whose law the company is formed and any alternate name adopted under section 30-6-805(1), Idaho Code.

(2) Information in an annual report under this section must be current as of the date the report is delivered to the secretary of state for filing.

(3) The annual report of a limited liability company or foreign limited liability company shall be delivered to the secretary of state each year before the end of the month during which a limited liability company was initially organized, or a foreign limited liability company was initially authorized to transact business. Beginning one (1) year after a limited liability company is organized or a foreign limited liability company is authorized to transact business, and each year thereafter, the annual report of the limited liability company must be received in the office of the secretary of state not later than the close of business on the final day of the applicable month. If the secretary of state finds that such report conforms to the requirements of this chapter, he shall file the same.

(4) If an annual report under this section does not contain the information required in subsection (1) of this section, the secretary of state shall promptly notify the reporting limited liability company or foreign limited liability company and return the report to it for correction. If the report is corrected to contain the information required in subsection (1) of this section and delivered to the secretary of state within thirty (30) days after the effective date of the notice, it is timely delivered.

(5) If an annual report under this section contains an address of a designated office or the name or address of a registered agent which differs from the information shown in the records of the secretary of state immediately before the annual report becomes effective, the differing information in the annual report is considered a statement of change under section 30-6-114, Idaho Code, or section 30-408, Idaho Code.

History.

I.C., § 30-6-209, as added by 2008, ch. 176, § 1, p. 494.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 210, which was based on ULLCA § 211.

A limited liability company that fails to comply with this section is subject to administrative dissolution. Section 705(a)(2) [§ 30-6-705(1)(a)]. A foreign limited liability com-

pany that fails to comply with this section is subject to having its certificate of authority revoked. Section 806(a)(2) [§ 30-6-806(1)(a)].

30-6-210. Filing, service and copying fees. — (1) The secretary of state shall collect the following fees for copying and certifying the copy of any document filed under this chapter:

(a) Twenty-five cents (25¢) per page for copying; and

(b) Ten dollars ($10.00) for a certificate.

(2) The secretary of state shall charge and collect the following fees when the documents described are delivered for filing:

(a) Certificate of organization	$100.00
(b) Correction statement	$ 30.00
(c) Statement of cancellation	$ 30.00
(d) Statement of authority	$ 30.00
(e) Statement of denial	$ 30.00
(f) Amendment of certificate of organization	$ 30.00
(g) Restatement of certificate of organization	$ 30.00
(h) Statement of dissolution	no fee

History.

I.C., § 30-6-210, as added by 2008, ch. 176, § 1, p. 494.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

PART 3. RELATIONS OF MEMBERS AND MANAGERS TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY

30-6-301. No agency power of member as member. — (1) A member is not an agent of a limited liability company solely by reason of being a member.

(2) A person's status as a member does not prevent or restrict law other than this chapter from imposing liability on a limited liability company because of the person's conduct.

History.

I.C., § 30-6-301, as added by 2008, ch. 176, § 1, p. 495.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to liability of limited liability company for acts of its members, managers, officers, and agents. 46 A.L.R.6th 1.

OFFICIAL COMMENT

Subsection (a) [(1)] — Most LLC statutes, including the original ULLCA, provide for what might be termed "statutory apparent authority" for members in a member-managed limited liability company and managers in a manager-managed limited liability company. This approach codifies the common law notion of apparent authority by position and dates back at least to the original, 1914 Uniform Partnership Act. UPA, § 9 provided that "the act of every partner ... for apparently carrying on in the usual way the business of the partnership ... binds the partnership," and that formulation has been essentially followed by RUPA, § 301, ULLCA, § 301, ULPA (2001), § 402, and myriad state LLC statutes.

This Act rejects the statutory apparent authority approach, for reasons summarized in a "Progress Report on the Revised Uniform Limited Liability Company Act," published in the March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations:

> The concept [of statutory apparent authority] still makes sense both for general and limited partnerships. A third party dealing with either type of partnership can know by the formal name of the entity and by a person's status as general or limited partner whether the person has the power to bind the entity.
>
> Most LLC statutes have attempted to use the same approach but with a fundamentally important (and problematic) distinction. An LLC's status as member-managed or manager-managed determines whether members or managers have the statutory power to bind. But an LLC's status as member- or manager-managed is not apparent from the LLC's name. A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC. As a result, a provision that originated in 1914 as a protection for third parties can, in the LLC context, easily function as a trap for the unwary. The problem is exacerbated by the almost infinite variety of management structures permissible in and used by LLCs.
>
> The new Act cuts through this problem by simply eliminating statutory apparent authority.

Pubogram, Vol. XXIII, no. 2 at 9-10.

Codifying power to bind according to position makes sense only for organizations that have well-defined, well-known, and almost paradigmatic management structures. Because:

- flexibility of management structure is a hallmark of the limited liability company; and
- an LLC's name gives no signal as to the organization's structure,

it makes no sense to:

- require each LLC to publicly select between two statutorily preordained structures (i.e., manager-managed/member-managed); and then
- link a "statutory power to bind" to each of those two structures.

Under this Act, other law — most especially the law of agency — will handle power-to-bind questions. See the Comment to subsection (b) [(2)].

This subsection does not address the power to bind of a manager in a manager-managed LLC, although this Act does consider a manager's management responsibilities. *See* Section 407(c) [§ 30-6-407(3)] (allocating management authority, subject to the operating agreement). For a discussion of how agency law will approach the actual and apparent authority of managers, see Section 407(c) [§ 30-6-407(3)], cmt.

Subsection (b) [(2)] — As the "flip side" to subsection (a) [(1)], this subsection expressly preserves the power of other law to hold an LLC directly or vicariously liable on account of conduct by a person who happens to be a member. For example, given the proper set of circumstances: (i) a member might have actual or apparent authority to bind an LLC to a contract; (ii) the doctrine of *respondeat superior* might make an LLC liable for the tortious conduct of a member (i.e., in some circumstances a member acts as a "servant" of the LLC); and (iii) an LLC might be liable for negligently supervising a member who is acting on behalf of the LLC. A person's status as a member does not weigh against these or any other relevant theories of law.

Moreover, subsection (a) [(1)] does not prevent member status from being relevant to one or more elements of an "other law" theory. The most categorical example concerns the authority of a non-manager member of a manager-managed LLC.

EXAMPLE: A vendor knows that an LLC is manager-managed but chooses to accept the signature of a person whom the vendor knows is merely a member of the LLC. Assuring the vendor that the LLC will stand by the member's commitment, the member states, "It's such a simple matter; no one will mind." The member genuinely believes the statement, and the vendor accepts the assurance.

The person's status as a mere member will undermine a claim of apparent authority. Restatement (Third) of Agency § 2.03, cmt. d (2006) (explaining the "reasonable belief" element of a claim of apparent authority, and role played by context, custom, and the supposed agent's position in an organization). Likewise, the member will have no actual authority. Absent additional facts, section 407(c)(1) [§ 30-6-407(3)(a)] (vesting all management authority in the managers) renders the member's belief unreasonable. Restatement (Third) of Agency § 2.01, cmt. c (2006) (explaining the "reasonable belief" element of a claim of actual authority).

In general, a member's actual authority to act for an LLC will depend fundamentally on the operating agreement.

EXAMPLE: Rachael and Sam, who have known each other for years, decide to go into business arranging musical tours. They fill out and electronically sign a one page form available on the website of the Secretary of State and become the organizers of MMT, LLC. They are the only members of the LLC, and their understanding of who will do what in managing the enterprise is based on several lengthy, late-night conversations that preceded the LLC's formation. Sam is to "get the acts," and Rachael is to manage the tour logistics. There is no written operating agreement.

In the terminology of this Act, MMT, LLC is member-managed, Section 407(a) [§ 30-6-407(1)], and the understanding reached in the late night conversations has become part of the LLC's operating agreement. Section 111(c) [§ 30-6-111(3)]. In agency law terms, the operating agreement constitutes a manifestation by the LLC to Rachael and Sam concerning the scope of their respective authority to act on behalf of the LLC. Restatement (Third) of Agency § 2.01, cmt. c (2006) (explaining that a person's actual authority depends first on some manifestation attributable to the principal and stating: "Actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation."

Circumstances outside the operating agreement can also be relevant to determining the scope of a member's actual authority.

EXAMPLE: Homeworks, LLC is a manager-managed LLC with three members. The LLC's written operating agreement:

- specifies in considerable detail the management responsibilities of Margaret, the LLC's manager-member, and also states that Margaret is responsible for "the day-to-day operations" of the company;
- puts Garrett, a non-manager member, in charge of the LLC's transportation department; and
- specifies no management role for Brooksley, the third member.

When the LLC's chief financial officer quits suddenly, Margaret asks Brooksley, a CPA, to "step in until we can hire a replacement."

Under the operating agreement, Margaret's request to Brooksley is within Margaret's actual authority and is a manifestation attributable to the LLC. If Brooksley manifests assent to Margaret's request, Brooksley will have the actual authority to act as the LLC's CFO.

In the unlikely event that two or more people form a member-managed LLC without any understanding of how to allocate management responsibility between or among them, agency law, operating in the context the Act's "gap fillers" on management responsibility, will produce the following result:

A single member of a multi-member, member-managed LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the activities of the company," section 407(b)(3) [§ 30-6-407(3)(d)]; and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," section 407(b)(2) [§ 30-6-407(2)(c)], unless the member has reason to know that other members might disagree or the member has some other reason to know that consultation with fellow members is appropriate.

For an explanation of this result, see Section 407(c) [§ 30-6-407(3)], cmt., which provides a detailed agency law analysis in the context of a multi-manager, manager-managed LLC whose operating agreement is silent on the analogous question.

The common law of agency will also determine the apparent authority of a member of a member-managed LLC, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. Restatement (Third) of Agency § 3.03, cmt. b (2006) ("A

principal may also make a manifestation by placing an agent in a defined position in an organization .... Third parties who interact with the principal through the agent will naturally and reasonably assume that the agent has authority to do acts consistent with the agent's position .... unless they have notice of facts suggesting that this may not be so.")

Under section 301(a) [(1) of this section], however, the mere fact that a person is a member of a member-managed limited liability company cannot *by itself* establish apparent authority by position. A course of dealing, however, may easily change the analysis:

EXAMPLE: David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, "David, as a member of DS, LLC." The vendor accepts the order, sends an invoice to the LLC's address, and in due course receives a check drawn on the LLC's bank account. When David next places an order with the vendor, the LLC's payment of the first order is a manifestation that the vendor may use in establishing David's apparent authority to place the second order.

30-6-302. Statement of authority. — (1) A limited liability company may deliver to the secretary of state for filing a statement of authority. The statement:

(a) Must include the name of the company and the street and mailing addresses of its designated office;

(b) With respect to any position that exists in or with respect to the company, may state the authority, or limitations on the authority, of all persons holding the position to:

(i) Execute an instrument transferring real property held in the name of the company; or

(ii) Enter into other transactions on behalf of, or otherwise act for or bind, the company; and

(c) May state the authority, or limitations on the authority, of a specific person to:

(i) Execute an instrument transferring real property held in the name of the company; or

(ii) Enter into other transactions on behalf of, or otherwise act for or bind, the company.

(2) To amend or cancel a statement of authority filed by the secretary of state under section 30-6-205(1), Idaho Code, a limited liability company must deliver to the secretary of state for filing an amendment or cancellation stating:

(a) The name of the company;

(b) The street and mailing addresses of the company's designated office;

(c) The caption of the statement being amended or canceled and the date the statement being affected became effective; and

(d) The contents of the amendment or a declaration that the statement being affected is canceled.

(3) A statement of authority affects only the power of a person to bind a limited liability company to persons that are not members.

(4) Subject to subsection (3) of this section and section 30-6-103(4), Idaho Code, and except as otherwise provided in subsections (6), (7) and (8) of this section, a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of knowledge or notice of the limitation by any person.

(5) Subject to subsection (3) of this section, a grant of authority not

pertaining to transfers of real property and contained in an effective statement of authority is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that when the person gives value:

(a) The person has knowledge to the contrary;

(b) The statement has been canceled or restrictively amended under subsection (2) of this section; or

(c) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(6) Subject to subsection (3) of this section, an effective statement of authority that grants authority to transfer real property held in the name of the limited liability company and that is delivered by the limited liability company to the secretary of state for filing is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(a) The statement has been canceled or restrictively amended under subsection (2) of this section; or

(b) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(7) Subject to subsection (3) of this section, if a statement containing a limitation on the authority to transfer real property held in the name of a limited liability company is filed with the secretary of state, all persons are deemed to know of the limitation.

(8) Subject to subsection (9) of this section, an effective statement of dissolution or termination is a cancellation of any filed statement of authority for the purposes of subsection (6) of this section and is a limitation on authority for the purposes of subsection (7) of this section.

(9) After a statement of dissolution becomes effective, a limited liability company may deliver to the secretary of state for filing a statement of authority that is designated as a postdissolution statement of authority. The statement operates as provided in subsections (6) and (7) of this section.

(10) Unless earlier canceled, an effective statement of authority is canceled by operation of law five (5) years after the date on which the statement, or its most recent amendment, becomes effective.

(11) An effective statement of denial operates as a restrictive amendment under this section.

History.

I.C., § 30-6-302, as added by 2008, ch. 176, § 1, p. 495.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This section is derived from and builds on RUPA, § 303, and, like that provision is conceptually divided into two realms: statements pertaining to the power to transfer interests in the LLC's real property and statements pertaining to other matters. In the latter realm, statements are filed only in the records of the Secretary of State, operate only to the extent the statements are actually known. Section 302(d) and (e) [(d) and (e) of this section].

As to interests in real property, in contrast, this section: (i) requires double-filing — with the Secretary of State and in the appropriate land records; and (ii) provides for constructive knowledge of statements limiting authority. Thus, a properly filed and recorded statement can protect the limited liability company, Section 302(g) [(7)], and, in order for a statement pertaining to real property to be a sword in the hands of a third party, the statement must have been both filed and properly recorded. Section 302(f) [not adopted in Idaho].

Subsection (a)(2) [(1)(b)] — This paragraph permits a statement to designate authority by position (or office) rather than by specific person. This type of a statement will enable LLCs to provide evidence of ongoing authority to enter into transactions without having to disclose to third parties the entirety of the operating agreement.

Here and elsewhere in the section, the phrase "real property" includes interests in real property, such as mortgages, easements, etc.

Subsection (b) [(2)] — For the requirement that the original statement, like any other record, be appropriately captioned, see Section 205(a) [§ 30-6-205(1)].

Subsection (c) [(3)] — This subsection contains a very important limitation — i.e., that this section's rules do not operate viz a viz members. The text of RUPA, § 303 makes this very important point only obliquely, but the Comment to that section is unequivocal:

> It should be emphasized that Section 303 concerns the authority of partners to bind the partnership to third persons. As among the partners, the authority of a partner to take any action is governed by the partnership agreement, or by the provisions of RUPA governing the relations among partners, and is not affected by the filing or recording of a statement of partnership authority.

RUPA § 303, comment 4.

However, like any other record delivered for filing on behalf of an LLC, a statement of authority might be some evidence of the contents of the operating agreement. *See* Comment to Section 112(d) [§ 30-6-112(4)].

Subsection (d) [(4)] — The phrase "by itself" is important, because the existence of a limitation could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsection (e)(1) [(5)(a)] — What happens if a statement of authority conflicts with the contents of an LLC's certificate of organization? The contents of the certificate are not statements of authority, Section 201(c) [§ 30-6-201(3)], so the information in the certificate does not directly figure into the operation of this section. However, if the person claiming to rely on a statement of authority had read the certificate's conflicting information before giving value, that fact might be evidence that person gave value with "knowledge to the contrary" of the statement.

IDAHO REPORTER'S COMMENT

Subsections (6) and (7) — The Idaho Act designates the office of the secretary of state as the only place to file a statement of authority. In particular, a statement of authority that grants or limits authority to transfer real property is centrally filed with the secretary of state rather than being recorded in the real property records of the county where the property is located. Subsection (7) provides that an effective statement of authority filed with the secretary of state that limits authority to transfer real property held in the name of the limited liability company is constructive knowledge to all persons of the limitation.

30-6-303. Statement of denial. — A person named in a filed statement of authority granting that person authority may deliver to the secretary of state for filing a statement of denial that:

(1) Provides the name of the limited liability company and the caption of the statement of authority to which the statement of denial pertains; and

(2) Denies the grant of authority.

History.

I.C., § 30-6-303, as added by 2008, ch. 176, § 1, p. 496.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

For the effect of a statement of denial, see Section 302(k) [§ 30-6-302(11)].

30-6-304. Liability of members and managers. — (1) The debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or otherwise:

(a) Are solely the debts, obligations or other liabilities of the company; and

(b) Do not become the debts, obligations or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.

(2) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company.

History.

I.C., § 30-6-304, as added by 2008, ch. 176, § 1, p. 497.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to personal liability of individual members and managers of limited liability company as to third parties. 47 A.L.R.6th 1.

OFFICIAL COMMENT

Subsection (a)(2) [(1)(b)] — This paragraph shields members and managers only against the debts, obligations and liabilities of the limited liability company and is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct.

EXAMPLE: A manager personally guarantees a debt of a limited liability company. Subsection (a)(2) [(1)(b)] is irrelevant to the manager's liability as guarantor.

EXAMPLE: A member purports to bind a limited liability company while lacking any agency law power to do so. The limited liability company is not bound, but the member is liable for having breached the

"warranty of authority" (an agency law doctrine). Subsection (a)(2) [(1)(b)] does not apply. The liability is not *for* a "debt[], obligation[], [or] liabilit[y] of a limited liability company," but rather is the member's direct liability resulting because the limited liability company is *not* indebted, obligated or liable. Restatement (Third) of Agency § 6.10 (2006).

EXAMPLE: A manager of a limited liability company defames a third party in circumstances that render the limited liability company vicariously liable under agency law. Under subsection (a)(2) [(1)(b)], the third party cannot hold the manager accountable for the company's liability, but that protection is immaterial. The manager is the tortfeasor and in that role is directly liable to the third party.

Subsection (a)(2) [(1)(b)] pertains only to claims by third parties and is irrelevant to claims by a limited liability company against a member or manager and *vice versa. See e.g.* Sections 408 [§ 30-6-408] (pertaining to a limited liability company's obligation to indemnify a member or manager), 409 [§ 30-6-409] (pertaining to management duties) and 901 [§ 30-6-901] (pertaining to a member's rights to bring a direct claim against a limited liability company).

Subsection (b) [(2)] — This subsection pertains to the equitable doctrine of "piercing the veil" — i.e., conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies. In the corporate realm, "disregard of corporate formalities" is a key factor in the piercing analysis. In the realm of LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired.

This subsection does not preclude consideration of another key piercing factor — disregard by an entity's owners of the entity's economic separateness from the owners.

EXAMPLE: The operating agreement of a three-member, member-managed limited liability company requires formal monthly meetings of the members. Each of the members works in the LLC's business, and they consult each other regularly. They have forgotten or ignore the requirement of monthly meetings. Under subsection (b) [(2)], that fact is irrelevant to a piercing claim.

EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not subsection (b) [(2)] formalities.

This subsection has no relevance to a member's claim of oppression under Section 701(a)(5)(B) [§ 30-6-701(1)(e)(ii)]. In some circumstances, disregard of agreed-upon formalities can be a "freeze out" mechanism. Likewise, this section has no relevance to a member's claim that the disregard of agreed-upon formalities is a breach of the operating agreement.

Provisions of regulatory law may impose liability by status on a member or manager. *See* Carter G. Bishop and Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law, ¶ 6.04(4) (Statutory Liability).

Part 4. Relations of Members to Each Other and to Limited Liability Company

30-6-401. Becoming a member. — (1) If a limited liability company is to have only one (1) member upon formation, the person becomes a member as agreed by that person and the organizer of the company. That person and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.

(2) If a limited liability company is to have more than one (1) member upon formation, those persons become members as agreed by the persons before the formation of the company. The organizer acts on behalf of the persons in forming the company and may be, but need not be, one (1) of the persons.

(3) After formation of a limited liability company, a person becomes a member:

(a) As provided in the operating agreement;

(b) As the result of a transaction effective under chapter 18, title 30, Idaho Code;

(c) With the consent of all the members; or

(d) If, within ninety (90) consecutive days after the company ceases to have any members:

(i) The last person to have been a member, or the legal representative of that person, designates a person to become a member; and

(ii) The designated person consents to become a member.

(4) A person may become a member without acquiring a transferable interest and without making or being obligated to make a contribution to the limited liability company.

History.

I.C., § 30-6-401, as added by 2008, ch. 176, § 1, p. 497.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Decisions Under Prior Law

Analysis

Operating agreement.
Written consent.

Operating Agreement.

Since manager was the only member of predecessor LLC, there was an implicit operating agreement that he was the manager of the company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Written Consent.

Where there is only one person involved in a limited liability company, that person is not prevented from becoming a member because he or she did not give written consent. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

OFFICIAL COMMENT

Most LLC statutes address in separate provisions: (i) how an LLC obtains its initial member or members; and (ii) how additional persons might later become members. This Act follows that approach. Subsections (a) and (b) [(1) and (2)] address the most common circumstances under which a limited liability company is formed — with one or more persons becoming members upon formation. Subsection (c) [not adopted by Idaho] addresses how a person becomes the initial member of an LLC whose certificate of organization was filed without there being any members. Subsection (d) [(3)] addresses how persons become members after an LLC has had at least one member.

For a discussion of the concept of a "shelf LLC" and this Act's requirement that a limited liability company have at least one member upon formation, see the Comment to Section 201 [§ 30-6-201].

Subsection (d)(4) [(3)(d)] — The personal representative of the last member may designate her-, him-, or itself as the new member.

Subsection (e) [(d)] — To accommodate business practices and also because a limited

liability company need not have a business purpose, this subsection permits so-called "non-economic members."

IDAHO REPORTER'S COMMENT

Shelf registrations of limited liability companies are not permitted in Idaho. See Idaho Reporter's Comments to Idaho Code § 30-6-201. As a result, RULLCA references to the subsection authorizing shelf registrations are not included in this section of the Idaho Act.

30-6-402. Form of contribution. — A contribution may consist of tangible or intangible property or other benefit to a limited liability company, including money, services performed, promissory notes, other agreements to contribute money or property, and contracts for services to be performed.

History.
I.C., § 30-6-402, as added by 2008, ch. 176, § 1, p. 497.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Decisions Under Prior Law

Credit.
Use of manager's credit to obtain construction loans was sufficient consideration for an interest in a limited liability company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

OFFICIAL COMMENT

Source — ULPA (2001) § 501, which derived from ULLCA § 401.

IDAHO REPORTER'S COMMENT

The issuance of LLC membership interests in consideration of "tangible or intangible property or other benefit to a limited liability company, including ... contracts for services to be performed" may violate the Idaho Constitution, which provides that "[n]o corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received ... ." Idaho Const. Art. XI § 9. Future services and contracts for future services do not qualify as permissible consideration for issuance of stock; nor do tangible or intangible benefits to the corporation other than labor, services, money or property. Property includes both real and personal property, including money, goods, chattels, things in action and evidence of debt. *Meholin v Carlson*, 17 Idaho 742, 107 P. 755 (1910). The term "corporation," as used in Art. XI, is defined broadly "to include all associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships." Idaho Const. Art. XI § 16. LLCs and corporations share the characteristics (among others) of perpetual existence and limited liability of equity owners; and LLCs are arguably "corporations" for purposes of the constitutional limitations on valid consideration for the issuance of LLC membership interests. *See Intermountain Lloyds v. Diefendorf*, 51 Idaho 304, 5 P.2d 730 (1931) (Limited liability enjoyed by members of an association of insurance underwriters is

"similar to that enjoyed by corporate stockholders [and] is a privilege not possessed by individuals or partnerships" under Idaho Const. Art. XI § 16).

30-6-403. Liability for contributions. — (1) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally. If a person does not make a required contribution, the person or the person's estate is obligated to contribute money equal to the value of the part of the contribution which has not been made, at the option of the company.

(2) A creditor of a limited liability company which extends credit or otherwise acts in reliance on an obligation described in subsection (1) of this section may enforce the obligation.

History.

I.C., § 30-6-403, as added by 2008, ch. 176, § 1, p. 497.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULLCA § 402, which is taken from RULPA § 502(b), which also gave rise to ULPA (2001) § 502.

Subsection (a) [(1)] — The reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

30-6-404. Sharing of and right to distributions before dissolution. — (1) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares among members and dissociated members, except to the extent necessary to comply with any transfer effective under section 30-6-502, Idaho Code, and any charging order in effect under section 30-6-503, Idaho Code.

(2) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(3) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in section 30-6-708(3), Idaho Code, a limited liability company may distribute an asset in kind if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(4) If a member or transferee becomes entitled to receive a distribution, the member or transferee is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution.

History.
I.C., § 30-6-404, as added by 2008, ch. 176, § 1, p. 498.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This Act follows both the original ULLCA and ULPA (2001) in omitting any default rule for allocation of losses. The Comment to ULPA (2001), § 503 explains that omission as follows:

This Act has no provision allocating profits and losses among the partners. Instead, the Act directly apportions the right to receive distributions. Nearly all limited partnerships will choose to allocate profits and losses in order to comply with applicable tax, accounting and other regulatory requirements. Those requirements, rather than this Act, are the proper source of guidance for that profit and loss allocation.

Subsection (b) [(2)] — The second sentence of this subsection accords with Section 603(a)(3) [§ 30-6-603(1)(c)] — upon dissociation a person is treated as a mere transferee of its own transferable interest. Like most *inter se* rules in this Act, this one is subject to the operating agreement. *See* Comment to Section 603(a)(3) [§ 30-6-603(a)(3)].

30-6-405. Limitations on distribution. — (1) A limited liability company may not make a distribution if after the distribution:

(a) The company would not be able to pay its debts as they become due in the ordinary course of the company's activities; or

(b) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up and termination of members whose preferential rights are superior to those of persons receiving the distribution.

(2) A limited liability company may base a determination that a distribution is not prohibited under subsection (1) of this section on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable under the circumstances.

(3) Except as otherwise provided in subsection (6) of this section, the effect of a distribution under subsection (1) of this section is measured:

(a) In the case of a distribution by purchase, redemption or other acquisition of a transferable interest in the company, as of the date money or other property is transferred or debt incurred by the company; and

(b) In all other cases, as of the date:

(i) The distribution is authorized, if the payment occurs within one hundred twenty (120) days after that date; or

(ii) The payment is made, if the payment occurs more than one hundred twenty (120) days after the distribution is authorized.

(4) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

(5) A limited liability company's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not a liability for purposes of subsection (1) of this section if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could be made to members under this section.

(6) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

(7) In subsection (1) of this section, "distribution" does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program.

History.

I.C., § 30-6-405, as added by 2008, ch. 176, § 1, p. 498.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 508, which was derived from ULLCA § 406, which was in turn derived from MBCA § 6.40.

Subsection (b) [(2)] — This subsection appears to involve a pure standard of ordinary care, in contrast with the more complicated approach stated in Section 409(c) [§ 30-6-409(3)].

Subsection (g) [(7)] — This exception applies only for the purposes of this section. See the Comment to Section 503(b)(2) [§ 30-6-503(2)(b)]. The exception is derived from existing statutory provisions. *See, e.g.*, Del. Code Ann., tit. 6, § 18-607(a) (2006) and Va. Code Ann. § 13.1-1035(E) (2006). *See also In re Tri-River Trading, LLC*, 329 B.R. 252, 266, (8th Cir. BAP 2005), aff'd, 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.")

30-6-406. Liability for improper distributions. — (1) Except as otherwise provided in subsection (2) of this section, if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of section 30-6-405, Idaho Code, and in consenting to the distribution fails to comply with section 30-6-409, Idaho Code, the member or manager is personally liable to the company for the amount of the distribution that exceeds the amount that could have been distributed without the violation of section 30-6-405, Idaho Code.

(2) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one (1) or more other members, the liability stated in subsection (1) of this section applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(3) A person that receives a distribution knowing that the distribution to

that person was made in violation of section 30-6-405, Idaho Code, is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 30-6-405, Idaho Code.

(4) A person against which an action is commenced because the person is liable under subsection (1) of this section may:

(a) Implead any other person that is subject to liability under subsection (1) of this section and seek to compel contribution from the person; and

(b) Implead any person that received a distribution in violation of subsection (3) of this section and seek to compel contribution from the person in the amount the person received in violation of subsection (3) of this section.

(5) An action under this section is barred if not commenced within two (2) years after the distribution.

History.

I.C., § 30-6-406, as added by 2008, ch. 176, § 1, p. 499.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — Same derivation as Section 405 [§ 30-6-405].

Liability under this section is not affected by a person ceasing to be a member, manager or transferee after the time that the liability attaches.

Subsection (b) [(2)] — The operating agreement could not accomplish the "switch" in liability provided by this subsection, because the "switch" implicates the rights of third parties under this Act. Section 110(c)(11) [§ 30-6-110(3)(k)].

Subsections (c) and (d)(2) [(3) and (4)(b)] — Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a member or manager.

30-6-407. Management of limited liability company. — (1) A limited liability company is a member-managed limited liability company unless the operating agreement:

(a) Expressly provides that:

(i) The company is or will be "manager-managed";

(ii) The company is or will be "managed by managers"; or

(iii) Management of the company is or will be "vested in managers"; or

(b) Includes words of similar import.

(2) In a member-managed limited liability company, as among the members, the following rules apply:

(a) The management and conduct of the company are vested in the members.

(b) Each member has equal rights in the management and conduct of the company's activities.

(c) A difference arising among members as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members.

(d) An act outside the ordinary course of the activities of the company may be undertaken only with the consent of all members.

(e) The operating agreement may be amended only with the consent of all members.

(3) In a manager-managed limited liability company, as among the members and the managers, the following rules apply:

(a) Except as otherwise expressly provided in this chapter, any matter relating to the activities of the company is decided exclusively by the managers.

(b) Each manager has equal rights in the management and conduct of the activities of the company.

(c) A difference arising among managers as to a matter in the ordinary course of the activities of the company may be decided by a majority of the managers.

(d) The consent of all members is required to:

(i) Sell, lease, exchange or otherwise dispose of all, or substantially all, of the company's property, with or without the good will, outside the ordinary course of the company's activities;

(ii) Approve a merger, conversion or domestication under part 10 of this chapter;

(iii) Undertake any other act outside the ordinary course of the company's activities; and

(iv) Amend the operating agreement.

(e) A manager may be chosen at any time by the consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the consent of a majority of the members without notice or cause.

(f) A person need not be a member to be a manager, but the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

(g) A person's ceasing to be a manager does not discharge any debt, obligation or other liability to the limited liability company or members which the person incurred while a manager.

(4) An action requiring the consent of members under this chapter may be taken without a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the member by signing an appointing record, personally or by the member's agent.

(5) The dissolution of a limited liability company does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

(6) This chapter does not entitle a member to remuneration for services performed for a member-managed limited liability company, except for

reasonable compensation for services rendered in winding up the activities of the company.

History.

I.C., § 30-6-407, as added by 2008, ch. 176, § 1, p. 500.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (a) [(1)] — This subsection follows implicitly from the definitions of "manager-managed" and "member-managed" limited liability companies, Section 102(10) and (12) [§ 30-6-102(11) and (13)], but is included here for the sake of clarity. Although this Act has eliminated the link between management structure and statutory apparent authority, Section 301 [§ 30-6-301], the Act retains the manager-managed and member-managed constructs as options for members to use to structure their *inter se* relationship.

Subsection (b) [(2)] — The subsection states default rules that, under Section 110 [§ 30-6-110], are subject to the operating agreement.

Subsection (c) [(3)] — Like subsection (b) [(2)], this subsection states default rules that, under Section 110 [§ 30-6-110], are subject to the operating agreement. For example, a limited liability company's operating agreement might state "This company is manager-managed," Section 102(10)(i), while providing that managers must submit specified ordinary matters for review by the members.

The actual authority of an LLC's manager or managers is a question of agency law and depends fundamentally on the contents of the operating agreement and any separate management contract between the LLC and its manager or managers. These agreements are the primary source of the manifestations of the LLC (as principal) from which a manager (as agent) will form the reasonable beliefs that delimit the scope of the manager's actual authority. Restatement (Third) of Agency § 3.01 (2006). *See also* Restatement (Second) of Agency §§ 15, 26.

Other information may be relevant as well, such as the course of dealing within the LLC, unless the operating agreement effectively precludes consideration of that information. See Section 110(a)(4) [§ 30-6-110(1)(d)] (stating that the operating agreement governs "the means and conditions for amending the operating agreement") and the comment to that subparagraph, which states that:

> [Although this] Act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes ... Paragraph (a)(4) [(1)(d)] could be read to encompass such authorization. Also, under Section 107 [§ 30-6-107] the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

If the operating agreement and a management contract conflict, the reasonable manager will know that the operating agreement controls the extent of the manager's rightful authority to act for the LLC — despite any contract claims the manager might have. *See* Section 111(a)(2) [§ 30-6-110(1)(b)] (stating that the operating agreement governs "the rights and duties under this chapter of a person in the capacity of manager") and the comment to that paragraph, which states:

> Because the term "[o]perating agreement .... includes the agreement as amended or restated," Section 102(13) [§ 30-6-102(15)], this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager.

See also Restatement (Third) of Agency § 8.13, cmt. b (2006) and Restatement (Second) of Agency, § 432, cmt. b (stating that, when a principal's instructions to an agent contravene a contract between the principal and agent, the agent may have a breach of contract claim but has no right to act contrary to the principal's instructions).

If (i) an LLC's operating agreement merely states that the LLC is manager-managed and does not further specify the managerial responsibilities, and (ii) the LLC has only one

manager, the actual authority analysis is simple. In that situation, this subsection:

- serves as "gap filler" to the operating agreement; and thereby
- constitutes the LLC's manifestation to the manager as to the scope of the manager's authority; and thereby
- delimits the manager's actual authority, subject to whatever subsequent manifestations the LLC may make to the manager (e.g., by a vote of the members, or an amendment of the operating agreement).

If the operating agreement states only that the LLC is manager-managed and the LLC has more than one manager, the question of actual authority has an additional aspect. It is necessary to determine what actual authority any one manager has to act alone.

Paragraphs (c)(2), (3), and (4) [(3)(b), (c), and (d)] combine to provide the answer. A single manager of a multi-manager LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the company's activities," paragraph (c)(4)(C) [(3)(d)(iii)], or any matter encompassed in paragraph (c)(4) [(3)(d)]; and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," paragraph (c)(3) [(3)(c)], unless the manager has reason to know that other managers might disagree or the manager has some other reason to know that consultation with fellow managers is appropriate.

The first point follows self-evidently from the language of paragraphs (c)(3) and (c)(4) [(3)(c) and (3)(d)]. In light of that language, no manager could reasonably believe to the contrary (unless the operating agreement provided otherwise).

The second point follows because:

- Subsection (c) [(3)] serves as the gap-filler manifestation from the LLC to its managers, and subsection (c) [(3)] does <u>not</u> require managers of a multi-manager <u>LLC</u> to act <u>only</u> in concert or after consultation.
- To the contrary, subject to the operating agreement:
  - paragraph (c)(2) [(3)(b)] expressly provides that "[e]ach manager has equal rights in the management and conduct of the activities of the company," and
  - paragraph (c)(3) [(3)(b)] suggests that several (as well as joint) activity is appropriate on ordinary matters, so long as the manager acting in the matter has no reason to believe that the matter will be controversial among the managers and therefore requires a decision under paragraph (c)(3) [(3)(c)].

While the individual members of a corporate board of directors lack actual authority to bind the corporation, 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, § 392 (noting "the overwhelming weight of authority"), subsection (c) [(3)] does not describe "board" management. Instead, subsection (c) [(3)] provides management rules derived from those that govern the members of a general partnership and multiple general partners of a limited partnership. RUPA, § 401 and ULPA (2001), § 406.

The common law of agency will also determine the apparent authority of an LLC's manager or managers, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. Restatement (Third) of Agency § 3.03 cmt. d (2006) ("The nature of an organization's business or activity is relevant to whether a third party could reasonably believe that a [manager] is authorized to commit the organization to a particular transaction.").

As a general matter, however — i.e., as to the apparent authority of the position of LLC manager under this Act — courts may view the position as clothing its occupants with the apparent authority to take actions that reasonably appear within the ordinary course of the company's business. The actual authority analysis stated above supports that proposition; absent a reason to believe to the contrary, a third party could reasonably believe a manager to possess the authority contemplated by the gap-fillers of the statute. *But see* Section 102(9) [§ 30-6-102(10)], cmt. (stating that "confusion around the term 'manager' is common to almost all LLC statutes").

Subsection (c)(5) [(3)(e)] — Under the default rule stated in this paragraph, dissolution of an entity that is a manager does not end the entity's status as manager. Contrast Section 602(4)(D) [§ 30-6-602(4)(d)] (referring to the expulsion of a member that is a partnership or limited liability company and authorizing the other members to expel, by unanimous consent, the dissolved partnership or limited liability company).

An LLC does not cease to be "manager-managed" simply because no managers are in place. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Subsection (c)(7) [(3)(g)] — The obligation to safeguard trade secrets and other confidential or propriety information is incurred when the person is a manager, and a subsequent cessation does not entitle the per-

son to usurp the information or use it to the prejudice of the LLC after the cessation.

Subsection (e) [(5)] — Under the default rules of this Act, it is not possible for a person to wrongfully cause dissolution (as distinguished from wrongfully dissociating). Compare Section 701 [§ 30-6-701] with Section 601(b) [§ 30-6-601(2)]. However, the operating agreement might contemplate wrongful dissolution, and this subsection would then apply — unless the operating provides otherwise. Under the second sentence of this subsection, a person might lose the rights to act as a manager without automatically and formally ceasing to be denominated as a manager.

Subsection (f) [(6)] — This provision traces back to the 1914 Uniform Partnership Act, § 18(f) and is included for fear that its absence might be misinterpreted as implying a contrary rule.

This Act does not provide for remuneration to a manager of a manager-managed LLC. That issue is for the operating agreement, or a separate agreement between the LLC and the manager. A manager seeking compensation will have the burden of proving an agreement. For a case demonstrating how *not* to establish an agreement, see *Jandrain v. Lovald*, 351 B.R. 679 (D. S.D. 2006).

30-6-408. Indemnification and insurance. — (1) A limited liability company shall reimburse for any payment made and indemnify for any debt, obligation or other liability incurred by a member of a member-managed company or the manager of a manager-managed company in the course of the member's or manager's activities on behalf of the company, if, in making the payment or incurring the debt, obligation or other liability, the member or manager complied with the duties stated in sections 30-6-405 and 30-6-409, Idaho Code.

(2) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under section 30-6-110(7), Idaho Code, the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

History.

I.C., § 30-6-408, as added by 2008, ch. 176, § 1, p. 501.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (a) [(1)] — This subsection states a default rule, which corresponds to the default rules on management duties. In the default mode, the correspondence is appropriate, because otherwise the statutory rule on indemnification could undercut or even vitiate the statutory rules on duty. Both this subsection and the rules on duty are subject to the operating agreement.

This subsection does not expressly require a limited liability company to provide advances to cover expenses. However, in some jurisdictions the indemnity obligation might be interpreted to include an obligation to make advances.

This subsection concerns only managers of manager-managed limited liability companies and members of member-managed companies. The definite article in the phrases "the member's" [paragraph (1)] and "the member" [paragraph (2)] refers back to the original phrase "A limited liability company shall reimburse ... and indemnify ... a member of a member-managed company ...." A limited liability company's obligation, if any, to reimburse or indemnify others (including non-

managing members of a manager-managed LLC and LLC employees) is a question for other law, including the law of agency.

Subsection (b) [(2)] — In contrast to subsection (a) [(1)], this subsection encompasses all members, not just members in a member-managed LLC.

This subsection's language is very broad and authorizes an LLC to purchase insurance to cover, e.g., a manager's intentional misconduct. It is unlikely that such insurance would be available. For restrictions on the power of an operating agreement to provide for indemnification, see Section 110 [§ 30-6-110], particularly subsection (g) [(7)].

30-6-409. Standards of conduct for members and managers. — (1) A member of a member-managed limited liability company owes to the company and, subject to section 30-6-901(2), Idaho Code, the other members the fiduciary duties of loyalty and care stated in subsections (2) and (3) of this section.

(2) The duty of loyalty of a member in a member-managed limited liability company includes the duties:

(a) To account to the company and to hold as trustee for it any property, profit or benefit derived by the member:

(i) In the conduct or winding up of the company's activities;

(ii) From a use by the member of the company's property; or

(iii) From the appropriation of a limited liability company opportunity;

(b) To refrain from dealing with the company in the conduct or winding up of the company's activities as or on behalf of a person having an interest adverse to the company; and

(c) To refrain from competing with the company in the conduct of the company's activities before the dissolution of the company.

(3) Subject to the business judgment rule, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company. In discharging this duty, a member may rely in good faith upon opinions, reports, statements or other information provided by another person that the member reasonably believes is a competent and reliable source for the information.

(4) A member in a member-managed limited liability company or a manager-managed limited liability company shall discharge the duties under this chapter or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(5) It is a defense to a claim under subsection (2)(b) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

(6) All of the members of a member-managed limited liability company or a manager-managed limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

(7) In a manager-managed limited liability company, the following rules apply:

(a) Subsections (1), (2), (3) and (5) of this section apply to the manager or managers and not the members.

(b) The duty stated under subsection (2)(c) of this section continues until winding up is completed.

(c) Subsection (4) of this section applies to the members and managers.

(d) Subsection (6) of this section applies only to the members.

(e) A member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.

History.

I.C., § 30-6-409, as added by 2008, ch. 176, § 1, p. 501.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Fiduciary Duties.

Whether a fiduciary has breached his duties of trust and loyalty is a question of fact. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

OFFICIAL COMMENT

This section follows the structure of many LLC acts, first stating the duties of members in a member-managed limited liability company and then using that statement and a "switching" mechanism, subsection (g) [(7)], to allocate duties in a manager-managed company. The duties stated in this section are subject to the operating agreement, but Section 110 [§ 30-6-110] contains important limitations on the power of the operating agreement to affect fiduciary duties and the obligation of good faith.

This section contains several noteworthy developments in the law of unincorporated business organizations:

- fiduciary duty is "uncabined" — see the Comment to subsections (a) and (b) [(1) and (2)];
- the duty of care is not set at gross negligence — see the Comment to subsection (c) [(3)]; and
- the statutory endorsement of self-interest is omitted — see the Comment to section (e) [(5)].

The standards, duties, and obligations of this Section are subject to delineation, restriction, and, to some extent, elimination by the operating agreement. See Section 110 [§ 30-6-110].

Subsections (a) and (b) [(1) and (2)] — Until the promulgation of RUPA, it was almost axiomatic that: (i) fiduciary duties reflect judge-made law; and (ii) statutory formulations can express some of that law but do not exhaustively codify it. The original UPA was a prime example of this approach.

In an effort to respect freedom of contract, bolster predictability, and protect partnership agreements from second-guessing, the Conference decided that RUPA should fence or "cabin in" all fiduciary duties within a statutory formulation. That decision was followed without re-consideration in ULLCA and ULPA (2001).

This Act takes a different approach. After lengthy discussion in the drafting committee and on the floor of the 2006 Annual Meeting, the Conference decided that: (i) the "corral" created by RUPA does not fit in the very complex and variegated world of LLCs; and (ii) it is impracticable to cabin all LLC-related fiduciary duties within a statutory formulation.

As a result, this Act: (i) eschews "only" and "limited to" — the words RUPA used in an effort to exhaustively codify fiduciary duty; (ii) codifies the core of the fiduciary duty of loyalty; but (iii) does not purport to discern every possible category of overreaching. One important consequence is to allow courts to continue to use fiduciary duty concepts to police disclosure obligations in member-to-member and member-LLC transactions.

Subsection (c) [(3)] — Although ULLCA, § 409(c) followed RUPA, § 404(c) and provided a gross negligence standard of care, at least a plurality of LLC statutes use an ordinary care standard. Sandra K. Miller, *The*

Role of the Court in Balancing Contractual Freedom With the Need For Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC, 152 U. Pa. L. Rev. 1609, 1658 (May 2004) (containing two tables characterizing the standard of care under LLC statutes: 21 states with "good faith prudent person" language and 19 states using "gross negligence or willful misconduct" language); Elizabeth S. Miller and Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations*, 30 Del. J. Corp. L. 343, 366-368 (2005) (stating that "[a]pproximately eighteen state LLC statutes parallel language formerly used in the MBCA and require managers and managing members to act in good faith and exercise the care of an ordinarily prudent person in a like position under similar circumstances"). See also William J. Callison, *"The Law Does Not Perfectly Comprehend ....": The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations,* 94 Ky. L.J. 451, 452 (2005-2006) ("examin[ing] the gross negligence standard and find[ing] it wanting, particularly as it has intruded, largely unexamined and by drafting osmosis, into subsequent uniform acts governing limited partnerships and limited liability companies").

In some circumstances, an unadorned standard of ordinary care is appropriate for those in charge of a business organization or similar, non-business enterprise. In others, the proper application of the duty of care must take into account the difficulties inherent in establishing an enterprise's most fundamental policies, supervising the enterprise's overall activities, or making complex business judgments. Corporate law subdivides circumstances somewhat according to the formal role exercised by the person whose conduct is later challenged (e.g., distinguishing the duties of directors from the duties of officers). LLC law cannot follow that approach, because a hallmark of the LLC entity is its structural flexibility.

This subsection, therefore, seeks "the best of both worlds" — stating a standard of ordinary care but subjecting that standard to the business judgment rule to the extent circumstances warrant. The content and force of the business judgment rule vary across jurisdictions, and therefore the meaning of this subsection may vary from jurisdiction to jurisdiction.

That result is intended. In any jurisdiction, the business judgment rule's application will vary depending on the nature of the challenged conduct. There is, for example, very little (if any) judgment involved when a person with managerial power acts (or fails to act) on an essentially ministerial matter. Moreover, under the law of many jurisdictions, the business judgment rule applies similarly across the range of business organizations. That is, the doctrine is sufficiently broad and conceptual so that the formality of organizational choice is less important in shaping the application of the rule than are the nature of the challenged conduct and the responsibilities and authority of the person whose conduct is being challenged.

This Act seeks therefore to invoke rather than unsettle whatever may be each jurisdiction's approach to the business judgment rule.

Subsection (d) [(4)] — This subsection refers to the "*contractual* obligation of good faith and fair dealing" to emphasize that the obligation is not an invitation to re-write agreements among the members. As explained in the Comment to ULPA (2001), § 305(b):

> The obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change ex post facto the parties' or this Act's allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.... In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights — i.e., duties and rights "under this [act]." However, for the most part those duties and rights apply to relationships *inter se* the members and the LLC and function only to the extent not displaced by the operating agreement. In the contract-based organization that is an LLC, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith makes sense.

As to whether the obligation stated in this subsection applies to transferees, see the Comment to Section 112(b) [§ 30-6-112(2)].

Subsection (e) [(5)] — Section 409 [this section] omits a noteworthy provision, which, beginning with RUPA, has been standard in the uniform business entity acts. RUPA, ULLCA, ULPA (2001) each placed the following language in the subsection following the formulation of the obligation of good faith:

> A member ... does not violate a duty or obligation under this [act] or under the operating agreement merely because the

member's conduct furthers the member's own interest.

This language is inappropriate in the complex and variegated world of LLCs. As a proposition of contract law, the language is axiomatic and therefore unnecessary. In the context of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing.

This Act's subsection (e) [(5)] takes a very different approach, stating a well-established principle of judge-made law. Despite Section 107 [§ 30-6-107], the statement is not surplusage. Given this Act's very detailed treatment of fiduciary duties and especially the Act's very detailed treatment of the power of the operating agreement to modify fiduciary duties, the statement is important because its absence might be confusing. (An *ex post* fairness justification is not the same as an *ex ante* agreement to modify, but the topics are sufficiently close for a danger of the affirmative pregnant.)

This Act also omits, as anachronistic and potentially confusing, any provision resembling ULLCA, § 409(f) ("A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.") *See also* ULPA (2001), § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.")

Those provisions originated to combat the notion that debts to partners were categorically inferior to debts to non-partner creditors. That notion has never been part of LLC law, and so a modern uniform LLC act need not include language combating the notion. Moreover, to the uninitiated the language can be confusing, because the words might: (i) seem to undercut the duty of loyalty, which they do not; and (ii) deflect attention from bankruptcy law and the law of fraudulent transfer, which assuredly can look askance at transactions between an entity and an "insider."

Subsection (f) [(6)] — The operating agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 110(e) [§ 30-6-110(5)]. See the Comment to that subsection.

Subsection (g) [(7)] — This is the "switching" mechanism, referred to in the introduction to this Comment.

Subsection (g)(2) [(7)(b)] — On the assumption that the members of a manager-managed LLC are dependent on the manager, this paragraph extends the duty longer than in a member-managed LLC.

Subsection (g)(5) [(7)(e)] — This paragraph merely negates a claim of fiduciary duty that is exclusively status-based and does not immunize misconduct.

EXAMPLE: Although a limited liability company is manager-managed, one member who is not a manager owns a controlling interest and effectively, albeit indirectly, controls the company's activities. A member owning a minority interest brings an action for dissolution under Section 701(a)(5)(B) [§ 30-6-701(1)(e)(ii)] (oppression by "the managers or those members in control of the company"). The court wishes to understand a claim as one alleging a breach of fiduciary duty by the controlling member. Subsection (g)(5) [(7)(e)] does not preclude that approach.

IDAHO REPORTER'S COMMENT

In Idaho, the business judgment rule has been recognized by the Courts and applied to the actions of directors of for-profit corporations. *Jordan v. Hunter*, 124 Idaho 899, 905, 865 P.2d 990, 996, fn. 3 (Ct. App. 1993). As applied to corporate directors, "the 'business judgment rule' immunizes the good faith acts of directors when the directors are acting within the powers of the corporation and within the exercise of their honest business judgment." *Steelman v. Mallory*, 110 Idaho 510, 513, 716 P.2d 1282, 1285 (Idaho 1986), citing *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316, 317 (1974) and *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 412 P.2d 47, 62-63 (1956). Idaho Courts have applied the business judgment rule to actions involving entities other than business corporations. (See, e.g., *Weaver v. Millard*, 120 Idaho 692, 819 P. 2d 110 (Ct. App. 1991) (business judgment rule applied to actions of partner in partnership); *Leppaluoto v. Warm Springs Hollow Homeowners Association, Inc.*, 114 Idaho 3, 752 P.2d 605 (Idaho 1988) (rule applied to actions of directors of non-profit corporation); and *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (Idaho 2005) (rule applied to actions of managers and directors of statutorily created State Insurance Fund, an "independent body corporate and politic").)

30-6-410. Right of members, managers and dissociated members to information. — (1) In a member-managed limited liability company, the following rules apply:

(a) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this chapter.

(b) The company shall furnish to each member:

(i) Without demand, any information concerning the company's activities, financial condition and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this chapter, except to the extent the company can establish that it reasonably believes the member already knows the information; and

(ii) On demand, any other information concerning the company's activities, financial condition and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.

(c) The duty to furnish information under paragraph (b) of this subsection also applies to each member to the extent the member knows any of the information described in paragraph (b) of this subsection.

(2) In a manager-managed limited liability company, the following rules apply:

(a) The informational rights stated in subsection (1) of this section and the duty stated in subsection (1)(c) of this section apply to the managers and not the members.

(b) During regular business hours and at a reasonable location specified by the company, a member may obtain from the company and inspect and copy full information regarding the activities, financial condition and other circumstances of the company as is just and reasonable if:

(i) The member seeks the information for a purpose material to the member's interest as a member;

(ii) The member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(iii) The information sought is directly connected to the member's purpose.

(c) Within ten (10) days after receiving a demand pursuant to paragraph (b)(ii) of this subsection, the company shall in a record inform the member that made the demand:

(i) Of the information that the company will provide in response to the demand and when and where the company will provide the information; and

(ii) If the company declines to provide any demanded information, the company's reasons for declining.

(d) Whenever this chapter or an operating agreement provides for a member to give or withhold consent to a matter, before the consent is

given or withheld, the company shall, without demand, provide the member with all information that is known to the company and is material to the member's decision.

(3) On ten (10) days' demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by subsection (2)(b) of this section. The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (2)(c) of this section.

(4) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(5) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (7) of this section applies both to the agent or legal representative and the member or dissociated member.

(6) The rights under this section do not extend to a person as transferee.

(7) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

History.

I.C., § 30-6-410, as added by 2008, ch. 176, § 1, p. 502.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This section is derived from ULPA (2001), §§ 304 (rights to information of limited partners and former limited partners) and 407 (same re: general partners and former general partners). The rules stated here are what might be termed "quasi-default rules" — subject to some change by the operating agreement. Section 110(c)(6) [§ 30-6-110(3)(f)] (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they may not necessarily be exhaustive. In some situations, some courts have seen owners' information rights as reflecting a fiduciary duty of those with management power. This Act's statement of fiduciary duties is not exhaustive. *See* Comment to Section 409 [§ 30-6-409] (explaining that this Act does not seek to "cabin in" all fiduciary duties). In contrast, the oper-

ating agreement has considerable "cabining in" power of its own. Section 110(d)(4) [§ 30-6-110(4)(d)].

Subsection (a) [(1)] — Paragraph 1 [(a)] states the rule pertaining to information memorialized in "record[s] maintained by the company". Paragraph 2 [(b)] applies to information not in such a record. Appropriately, paragraph (2) [(b)] sets a more demanding standard for those seeking information.

Subsection (a)(2) and (3) [(1)(b) and (c)] — In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the LLC, especially when the violation has interfered with an approval or veto mechanism involving member consent. *E.g., Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279-280 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable)".

Subsection (a)(2) [(1)(b)] — Violation of this paragraph could give rise to a claim for damages against a member or manager [see subsection (b)(1) [(2)(a)]] who breaches the duties stated in Section 409 [§ 30-6-409] in causing or suffering the LLC to violate this paragraph.

Subsection (a)(3) [(1)(c)] — A member's violation of this paragraph is actionable in damages without need to show a violation of a duty stated in Section 409 [§ 30-6-409].

Subsection (b)(1) [(2)(a)] — This is a switching provision. A manager's violation of the duty stated in subsection (a)(3) [(1)(c)]is actionable in damages without need to show a violation of a duty stated in Section 409 [§ 30-6-409].

Subsection (b)(2) [(2)(b)] — This paragraph refers to "information" rather than "records maintained by the company" — compare subsection (a) [(1)] — so in some circumstances the company might have an obligation to memorialize information. Such circumstances will likely be rare or at least unusual. Section 410 [§ 30-6-410] generally concerns providing existing information, not creating it. In any event, a member does not trigger the company's obligation under this paragraph merely by satisfying subparagraphs (A) through (C) [(i) through (iii)]. The member must also satisfy the "just and reasonable" requirement.

Subsection (c) [(3)] — This section does not control the rights of the estate of a member who dissociates by dying. In that circumstance, Section 504 [§ 30-6-504] controls.

Subsection (g) [(7)] — The phrase "as a matter within the ordinary course of its activities" means that a mere majority consent is needed to impose a restriction or condition. *See* Section 407(b)(3) and (c)(3) [§ 30-6-407(2)(c) and (3)(c)]. This approach is necessary, lest a requesting member (or manager-member) have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the LLC.

The burden of proof under this subsection contrasts with the burden of proof when someone claims that a term of an operating agreement violates Section 110(c)(6) [§ 30-6-110(3)(f)]. Under that subsection, as a matter of ordinary procedural law, the burden is on the person making the claim.

Part 5. Transferable Interests and Rights of Transferees and Creditors

30-6-501. Nature of transferable interest. — A transferable interest is personal property.

History.

I.C., § 30-6-501, as added by 2008, ch. 176, § 1, p. 504.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to formation of limited liability company and addition or disassociation of members thereto. 43 A.L.R.6th 611.

OFFICIAL COMMENT

Source — This Article most directly follows ULPA (2001), Article 7, because ULPA (2001) reflects the Conference's most recent thinking on the issues addressed here. However, ULPA (2001), Article 7 is quite similar in substance to ULLCA, Article 5, and both those Articles derive from Article 5 of RUPA.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the facts and the rules stated in those Articles.

This Act does not include ULLCA § 501(a), which provided: "A member is not a co-owner of, and has no transferable interest in, property of a limited liability company." That language was a vestige of the "aggregate" notion of the law of general partnerships, and in a modern LLC statute would be at least surplusage and perhaps confusing as well.

30-6-502. Transfer of transferable interest. — (1) A transfer, in whole or in part, of a transferable interest:

(a) Is permissible, provided however, that the transfer of a transferable interest in a professional company is not permissible absent compliance with section 30-6-201A(7), Idaho Code;

(b) Does not by itself cause a member's dissociation or a dissolution and winding up of the limited liability company's activities; and

(c) Subject to section 30-6-504, Idaho Code, does not entitle the transferee to:

(i) Participate in the management or conduct of the company's activities; or

(ii) Except as otherwise provided in subsection (3) of this section, have access to records or other information concerning the company's activities.

(2) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(3) In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company's transactions only from the date of dissolution.

(4) A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(5) A limited liability company need not give effect to a transferee's rights under this section until the company has notice of the transfer.

(6) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(7) Except as otherwise provided in section 30-6-602(4)(b), Idaho Code, when a member transfers a transferable interest, the transferor retains the rights of a member other than the interest in distributions transferred and retains all duties and obligations of a member.

(8) When a member transfers a transferable interest to a person that becomes a member with respect to the transferred interest, the transferee is liable for the member's obligations under sections 30-6-403 and 30-6-406(3), Idaho Code, known to the transferee when the transferee becomes a member.

History.
I.C., § 30-6-502, as added by 2008, ch. 176, § 1, p. 504.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

Decisions Under Prior Law

Authority of Manager.
Manager of LLC had apparent authority to bind LLC when he sold real estate lots, as this was part of the normal business or affairs of the company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

OFFICIAL COMMENT

One of the most fundamental characteristics of LLC law is its fidelity to the "pick your partner" principle. This section is the core of the Act's provisions reflecting and protecting that principle.

A member's rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the operating agreement otherwise provides, a member acting without the consent of all other members lacks both the power and the right to: (i) bestow membership on a non-member, Section 401(d) [§ 30-6-401(4)]; or (ii) transfer to a non-member anything other than some or all of the member's transferable interest. Section 502(a)(3) [§ 30-6-502(1)(c)]. However, consistent with current law, a member may transfer governance rights to another member without obtaining consent from the other members. Thus, this Act does not itself protect members from control shifts that result from transfers among members (as distinguished from transfers to non-members who seek thereby to become members).

This section applies regardless of whether the transferor is a member, a transferee of a member, a transferee of a transferee, etc. *See* Section 102(21) [§ 30-6-102(26)] (defining "transferable interest" in terms of a right "originally associated with a person's capacity as a member" regardless of "whether or not the person remains a member or continues to own any part of the right").

Subsection (a) [(1)] — The definition of "transfer," Section 102(20) [§ 30-6-102(25)], and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones as well. Thus, for example, a charging order under Section 503 [§ 30-6-503] effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a member's rights to distribution.

Subsection (a)(2) [(1)(b)] — Section 602(4)(B) [§ 30-6-602(4)(b)] creates a risk of dissociation via expulsion when a member transfers all of the member's transferable interest.

Subsection (a)(3) [(1)(c)] — Mere transferees have no right to intrude as the members carry on their activities as members. When a member dies, other law may effect a transfer of the member's interest to the member's estate or personal representative. Section 504 [§ 30-6-504] contains special rules applicable to that situation.

Subsection (b) [(2)] — Amounts due under this subsection are of course subject to offset for any amount owed to the limited

liability company by the member or dissociated member on whose account the distribution is made. As to whether an LLC may properly offset for claims against a transferor that was never a member is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (d) [(4)] — The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

30-6-503. Charging order. — (1) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.

(2) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (1) of this section, the court may:

(a) Appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(b) Make all other orders necessary to give effect to the charging order.

(3) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale only obtains the transferable interest, does not thereby become a member, and is subject to section 30-6-502, Idaho Code.

(4) At any time before foreclosure under subsection (3) of this section, the member or transferee whose transferable interest is subject to a charging order under subsection (1) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(5) At any time before foreclosure under subsection (3) of this section, a limited liability company or one (1) or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(6) This chapter does not deprive any member or transferee of the benefit of any exemption laws applicable to the member's or transferee's transferable interest.

(7) This section provides the exclusive remedy by which a person seeking to enforce a judgment against a member or transferee may, in the capacity of judgment creditor, satisfy the judgment from the judgment debtor's transferable interest.

History.

I.C., § 30-6-503, as added by 2008, ch. 176, § 1, p. 505.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the

repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Charging order provisions appear in various forms in UPA, ULPA, RULPA, RUPA, ULLCA, and ULPA (2001). This section builds on those acts, while: (i) modernizing the language: (ii) making explicit certain points that have been at best implicit; and (iii) seeking to delineate more precisely the types of extraordinary circumstances that would have to exist before a court enforcing a charging order would be justified in interfering with an LLC's management or activities.

This section balances the needs of a judgment creditor of a member or transferee with the needs of the limited liability company and the members. The section achieves that balance by allowing the judgment creditor to collect on the judgment through the transferable interest of the judgment debtor while prohibiting interference in the management and activities of the limited liability company.

Under this section, the judgment creditor of a member or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the member or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited liability company.

The operating agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 110(c)(11) [§ 30-6-110(3)(k)].

Subsection (a) [(1)] — The phrase "judgment debtor" encompasses both members and transferees. As a matter of civil procedure and due process, an application for a charging order must be served both on the limited liability company and the member or transferee whose transferable interest is to be charged.

Subsection (b) [(2)] — Paragraph (2) [(b)] refers to "other orders" rather than "additional orders". Therefore, given appropriate circumstances, a court may invoke either paragraph (1) or (2) [(a) or (b)] or both.

Subsection (b)(1) [(2)(a)] — The receiver contemplated here is not a receiver for the limited liability company, but rather a receiver for the distributions. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collections of distributions pursuant to a charging order."

Subsection (b)(2) [(2)(b)] — This paragraph must be understood in the context of the balance described in the introduction to this section's Comment. In particular, the court's power to make orders "that the circumstances may of the case may require" is limited to "giv[ing] effect to the charging order."

> **Example:** A judgment creditor with a charging order believes that the limited liability company should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited liability company to restrict re-investment. Subsection (b)(2) [(2)(b)] does not authorize the court to grant the motion.
>
> **Example:** A judgment creditor with a judgment for $10,000 against a member obtains a charging order against the member's transferable interest. Having been properly served with the order, the limited liability company nonetheless fails to comply and makes a $3000 distribution to the member. The court has the power to order the limited liability company to pay $3000 to the judgment creditor to "give effect to the charging order."

Under subsection (b)(2) [(2)(b)], the court also has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order. To the extent a payment is not a distribution, it is not part of the transferable interest and is not subject to subsection (g) [(7)]. The payment is therefore subject to whatever other creditor remedies may apply.

Section 405(g) [§ 30-6-405(7)] states a special exception to the definition of "distribution," but that exception applies only "in subsection (1)" of Section 405 [§ 30-6-405]. Therefore, whether a charging order applies to "amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program," Section 405(g) [§ 30-6-405(7)], is a question determined under this section, without regard to Section 405(g) [§ 30-6-405(7)]. To date, case law is scant, but there is authority holding that compensation is a distribution. *PB Real Estate, Inc. v. Dem II Properties*, 719 A.2d 73, 75 (Conn. App. Ct. 1998) (rejecting the defendants' claim that the

payments at issue were merely compensation for their services to their law firm, which was organized as an LLC; noting that the defendants' characterization was at odds with the firm's business records and tax returns; holding that the payments received were distributions subject to the charging order).

This Act has no specific rules for determining the fate or effect of a charging order when the limited liability company undergoes a merger, conversion, or domestication under Part 10. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2) [(2)(b)].

Subsection (c) [(3)] — The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g., Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).

Subsection (e) [(5)] — This Act jettisons the confusing concept of redemption and substitutes an approach that more closely parallels the modern, real-world possibility of the LLC or its members buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the LLC). When possible, buying the judgment remains superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment, (ii) while the LLC or the other members might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the LLC.

Whether an LLC's decision to invoke this subsection is "ordinary course" or "outside the ordinary course," Section 407(b)(3) and (4) and (c)(3) and (4)(C) [§ 30-6-407(2)(c) and (d) and (3)(c) and (d)(iii)], depends on the circumstances. However, the involvement of this subsection does not by itself make the decision "outside the ordinary course."

Subsection (g) [(7)] — This subsection does not override Article [Part] 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article [Part] 9 alone, under this section alone, or under both Article [Part] 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article [Part] 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a limited liability company in a patent attempt frustrate the judgment creditor).

30-6-504. Power of personal representative of deceased member. — If a member dies, the deceased member's personal representative or other legal representative may exercise the rights of a transferee provided in section 30-6-502(3), Idaho Code, and, for the purposes of settling the estate, the rights of a current member under section 30-6-410, Idaho Code.

History.

I.C., § 30-6-504, as added by 2008, ch. 176, § 1, p. 505.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULPA (2001) § 704.

Section 410 [§ 30-6-410] pertains only to information rights.

Part 6. Member's Dissociation

30-6-601. Member's power to dissociate — Wrongful dissociation. — (1) A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under section 30-6-602(1), Idaho Code.

(2) A person's dissociation from a limited liability company is wrongful only if the dissociation:

(a) Is in breach of an express provision of the operating agreement; or

(b) Occurs before the termination of the company and:

(i) The person withdraws as a member by express will;

(ii) The person is expelled as a member by judicial order under section 30-6-602(5), Idaho Code;

(iii) The person is dissociated under section 30-6-602(7)(a), Idaho Code, by becoming a debtor in bankruptcy; or

(iv) In the case of a person that is not a trust other than a business trust, an estate or an individual, the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated.

(3) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to section 30-6-901, Idaho Code, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation or other liability of the member to the company or the other members.

History.
I.C., § 30-6-601, as added by 2008, ch. 176, § 1, p. 505.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to formation of limited liability company and addition or disassociation of members thereto. 43 A.L.R.6th 611.

OFFICIAL COMMENT

Source — ULPA (2001) § 604, which is based on RUPA Section 602. ULLCA § 602 is functionally identical in some respects but is not a good overall source, because that section presupposes the term/at-will paradigm.

30-6-602. Events causing dissociation. — A person is dissociated as a member from a limited liability company when:

(1) The company has notice of the person's express will to withdraw as a member, but, if the person specified a withdrawal date later than the date the company had notice, on that later date;

(2) An event stated in the operating agreement as causing the person's dissociation occurs;

(3) The person is expelled as a member pursuant to the operating agreement;

(4) The person is expelled as a member by the unanimous consent of the other members if:

(a) It is unlawful to carry on the company's activities with the person as a member;

(b) There has been a transfer of all of the person's transferable interest in the company, other than:

(i) A transfer for security purposes; or

(ii) A charging order in effect under section 30-6-503, Idaho Code, which has not been foreclosed;

(c) The person is a corporation and, within ninety (90) days after the company notifies the person that it will be expelled as a member because the person has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the certificate of dissolution has not been revoked or its charter or right to conduct business has not been reinstated; or

(d) The person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) On application by the company, the person is expelled as a member by judicial order because the person:

(a) Has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;

(b) Has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under section 30-6-409, Idaho Code; or

(c) Has engaged in, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member;

(6) In the case of a person who is an individual:

(a) The person dies; or

(b) In a member-managed limited liability company:

(i) A guardian or general conservator for the person is appointed; or

(ii) There is a judicial order that the person has otherwise become incapable of performing the person's duties as a member under this chapter or the operating agreement;

(7) In a member-managed limited liability company, the person:

(a) Becomes a debtor in bankruptcy;

(b) Executes an assignment for the benefit of creditors; or

(c) Seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the person or of all or substantially all of the person's property;

(8) In the case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust's entire transferable interest in the company is distributed;

(9) In the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the company is distributed;

(10) In the case of a member that is not an individual, partnership, limited liability company, corporation, trust or estate, the termination of the member;

(11) The company participates in a merger under chapter 18, title 30, Idaho Code, if:

(a) The company is not the surviving entity; or

(b) Otherwise as a result of the merger, the person ceases to be a member;

(12) The company participates in a conversion under chapter 18, title 30, Idaho Code;

(13) The company participates in a domestication under chapter 18, title 30, Idaho Code, if, as a result of the domestication, the person ceases to be a member;

(14) The company terminates; or

(15) In the case of a professional company, restrictions or limitations are placed upon a member's ability to continue to render professional services.

History.
I.C., § 30-6-602, as added by 2008, ch. 176, § 1, p. 506.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to formation of limited liability company and addition or disassociation of members thereto. 43 A.L.R.6th 611.

OFFICIAL COMMENT

Source — ULLCA § 601; RUPA Section 601; ULPA (2001) §§ 601 and 603.

Paragraph (4)(B) [(4)(b)] — Under this paragraph (unless the operating agreement provides otherwise), a member's transferee can protect itself from the vulnerability of "bare transferee" status by obligating the member/transferor to retain a 1% interest and then to exercise its governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

30-6-603. Effect of person's dissociation as member. — (1) When a person is dissociated as a member of a limited liability company:

(a) The person's right to participate as a member in the management and conduct of the company's activities terminates;

(b) If the company is member-managed, the person's fiduciary duties as a member end with regard to matters arising and events occurring after the person's dissociation; and

(c) Subject to section 30-6-504, Idaho Code, and chapter 18, title 30, Idaho

Code, any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee.

(2) A person's dissociation as a member of a limited liability company does not of itself discharge the person from any debt, obligation or other liability to the company or the other members which the person incurred while a member.

History.

I.C., § 30-6-603, as added by 2008, ch. 176, § 1, p. 507.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 605, which was drawn from RUPA Section 603(b).

Subsection (a) [(1)] — This provision makes no reference to power-to-bind matters, because the Act provides that a member *qua* member has no power to bind the LLC. Section 301 [§ 30-6-301].

Subsection (a)(2) [(1)(b)] — This provision applies only when the limited liability company is member-managed, because in a manager-managed LLC these duties do not apply to a member *qua* member. Section 409(g)(5) [§ 30-6-409(7)(e)].

Subsection (a)(3) [(1)(c)] — This paragraph accords with Section 404(b)]§ 30-6-404(2)] — dissociation does not entitle a person to any distribution. Like most *inter se* rules in this Act, this one is subject to the operating agreement. For example, the operating agreement has the power to provide for the buy out of a person's transferable interest in connection with the person's dissociation.

Subsection (b) [(2)] — In a member-managed limited liability company, the obligation to safeguard trade secrets and other confidential or proprietary information is incurred when a person is a member. A subsequent dissociation does not entitle the person to usurp the information or use it to the prejudice of the LLC after the dissociation. (In a manager-managed LLC, any obligations of a non-manager member *viz a viz* proprietary information would be a matter for the operating agreement, the obligation of good faith, or other law.)

Part 7. Dissolution and Winding Up

30-6-701. Events causing dissolution. — (1) A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:

(a) An event or circumstance that the operating agreement states causes dissolution;

(b) The consent of all the members;

(c) The passage of ninety (90) consecutive days during which the company has no members;

(d) On application by a member, the entry by the district court of an order dissolving the company on the grounds that:

(i) The conduct of all or substantially all of the company's activities is unlawful; or

(ii) It is not reasonably practicable to carry on the company's activities

in conformity with the certificate of organization and the operating agreement; or

(e) On application by a member, the entry by the district court of an order dissolving the company on the grounds that the managers or those members in control of the company:

(i) Have acted, are acting, or will act in a manner that is illegal or fraudulent; or

(ii) Have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

(2) In a proceeding brought under subsection (1)(e) of this section, the district court may order a remedy other than dissolution.

History.

I.C., § 30-6-701, as added by 2008, ch. 176, § 1, p. 508.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

JUDICIAL DECISIONS

DECISIONS UNDER PRIOR LAW

Attorney Fees.

Court found that "irreparable injury" under former § 53-643 was different from "irreparable damage" under the applicable operating agreement in a dissolution action; whereas "irreparable injury" involves a threat to the ability of a company to continue to operate, irreparable damage is tied to actions one party to the agreement might seek to enjoin or compel to preserve or increase the value of their ownership; therefore, appellant's dissolution action did not meet the standard set forth in the operating agreement for an award of costs and fees. Henderson v. Henderson Inv. Props., LLC, 148 Idaho 638, 227 P.3d 568 (2010).

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to dissolution and winding up of affairs of limited liability company. 49 A.L.R.6th 1.

OFFICIAL COMMENT

Subsection (a)(4) [(1)(d)] — The standard stated here is conventional, and this subsection (a)(4) [(1)(d)] is non-waivable. Section 110(c)(7) [§ 30-6-110(3)(g)].

Subsection (a)(5) [(1)(e)] — ULLCA § 801(4)(v) contains a comparable provision, although that provision also gives standing to dissociated members. Even in non-ULLCA states, courts have begun to apply close corporation "oppression" doctrine to LLCs.

This provision's reference to "those members in control of the company" implies that such members have a duty to avoid acting oppressively toward fellow members.

Section (a)(5) [(1)(e)] is non-waivable. *See* Section 110(c)(7) [§ 30-6-110(3)(g)].

Subsection (b) [(2)] — In the close corporation context, many courts have reached this position without express statutory authority, most often with regard to court-ordered buyouts of oppressed shareholders. This subsection saves courts and litigants the trouble of re-inventing that wheel in the LLC context. However, unlike, subsection (a)(4) and (5) [(1)(d) and (e)], subsection (b) [(2)] can be overridden by the operating agreement. Thus, the members may agree to restrict or eliminate a court's power to craft a lesser remedy,

even to the extent of confining the court (and themselves) to the all-or-nothing remedy of dissolution.

30-6-702. Winding up. — (1) A dissolved limited liability company shall wind up its activities, and the company continues after dissolution only for the purpose of winding up.

(2) In winding up its activities, a limited liability company:

(a) Shall discharge the company's debts, obligations or other liabilities, settle and close the company's activities, and marshal and distribute the assets of the company; and

(b) May:

(i) Deliver to the secretary of state for filing a statement of dissolution stating the name of the company and that the company is dissolved;

(ii) Preserve the company activities and property as a going concern for a reasonable time;

(iii) Prosecute and defend actions and proceedings, whether civil, criminal or administrative;

(iv) Transfer the company's property;

(v) Settle disputes by mediation or arbitration;

(vi) Deliver to the secretary of state for filing a statement of termination stating the name of the company and that the company is terminated; and

(vii) Perform other acts necessary or appropriate to the winding up.

(3) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company. If the person does so, the person has the powers of a sole manager under section 30-6-407(3), Idaho Code, and is deemed to be a manager for the purposes of section 30-6-304(1)(b), Idaho Code.

(4) If the legal representative under subsection (3) of this section declines or fails to wind up the company's activities, a person may be appointed to do so by the consent of transferees owning a majority of the right to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection:

(a) Has the powers of a sole manager under section 30-6-407(3), Idaho Code, and is deemed to be a manager for the purposes of section 30-6-304(1)(b), Idaho Code; and

(b) Shall promptly deliver to the secretary of state for filing an amendment to the company's certificate of organization to:

(i) State that the company has no members;

(ii) State that the person has been appointed pursuant to this subsection to wind up the company; and

(iii) Provide the street and mailing addresses of the person.

(5) The district court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company's activities:

(a) On application of a member, if the applicant establishes good cause;

(b) On the application of transferee, if:

(i) The company does not have any members;

(ii) The legal representative of the last person to have been a member declines or fails to wind up the company's activities; and

(iii) Within a reasonable time following the dissolution a person has not been appointed pursuant to subsection (3) of this section; or

(c) In connection with a proceeding under section 30-6-701(1)(d) or (e), Idaho Code.

History.

I.C., § 30-6-702, as added by 2008, ch. 176, § 1, p. 508.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to dissolution and winding up of affairs of limited liability company. 49 A.L.R.6th 1.

OFFICIAL COMMENT

Source — ULPA (2001) § 803, which was based on RUPA Sections 802 and 803.

Because under this Act the power to bind a limited liability company to a third party is primarily a matter of agency law, Section 301 § 30-6-301], Comment, this Act has no need of provisions delineating the effect of dissolution on a member or manager's power to bind.

Subsection (b)(2)(A) and (F) [(2)(b)(i) and (vi)] — For the constructive notice effect of a statement of dissolution or termination, see Section 103(d)(2)(A) and (B) [§ 30-6-103(4)(b)(i) and (ii)].

30-6-703. Known claims against dissolved limited liability company. — (1) Except as otherwise provided in subsection (4) of this section, a dissolved limited liability company may give notice of a known claim under subsection (2) of this section, which has the effect as provided in subsection (3) of this section.

(2) A dissolved limited liability company may in a record notify its known claimants of the dissolution. The notice must:

(a) Specify the information required to be included in a claim;

(b) Provide a mailing address to which the claim is to be sent;

(c) State the deadline for receipt of the claim, which may not be less than one hundred twenty (120) days after the date the notice is received by the claimant; and

(d) State that the claim will be barred if not received by the deadline.

(3) A claim against a dissolved limited liability company is barred if the requirements of subsection (2) of this section are met and:

(a) The claim is not received by the specified deadline; or

(b) If the claim is timely received but rejected by the company:

(i) The company causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant

commences an action against the company to enforce the claim within ninety (90) days after the claimant receives the notice; and

(ii) The claimant does not commence the required action within the ninety (90) days.

(4) This section does not apply to a claim based on an event occurring after the effective date of dissolution or a liability that on that date is contingent.

History.

I.C., § 30-6-703, as added by 2008, ch. 176, § 1, p. 509.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 806, which was based on ULLCA § 807, which in turn was based on MBCA § 14.06.

30-6-704. Other claims against dissolved limited liability company. — (1) A dissolved limited liability company may publish notice of its dissolution and request persons having claims against the company to present them in accordance with the notice.

(2) The notice authorized by subsection (1) of this section must:

(a) Be published at least once in a newspaper of general circulation in the county in this state in which the dissolved limited liability company's principal office is located or, if it has none in this state, in the county in which the company's designated office is or was last located;

(b) Describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent; and

(c) State that a claim against the company is barred unless an action to enforce the claim is commenced within five (5) years after publication of the notice.

(3) If a dissolved limited liability company publishes a notice in accordance with subsection (2) of this section, unless the claimant commences an action to enforce the claim against the company within five (5) years after the publication date of the notice, the claim of each of the following claimants is barred:

(a) A claimant that did not receive notice in a record under section 30-6-703, Idaho Code;

(b) A claimant whose claim was timely sent to the company but not acted on; and

(c) A claimant whose claim is contingent at, or based on an event occurring after, the effective date of dissolution.

(4) A claim not barred under this section may be enforced:

(a) Against a dissolved limited liability company, to the extent of its undistributed assets; and

(b) If assets of the company have been distributed after dissolution, against a member or transferee to the extent of that person's proportionate share of the claim or of the assets distributed to the member or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph does not exceed the total amount of assets distributed to the person after dissolution.

History.

I.C., § 30-6-704, as added by 2008, ch. 176, § 1, p. 510.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 807, which was based on ULLCA § 808, which in turn was based on MBCA § 14.07.

Subsection (d)(2) [(4)(b)] — Liability under this paragraph extends to those who have received distributions under a charging order. *See* Comment to 502(a) [§ 30-6-502(1)] (explaining that the beneficiary of a charging order is a transferee). Unlike Section 406(c) [§ 30-6-406(3)] (recapture of improper interim distributions), this paragraph contains no "knowledge" element.

30-6-705. Grounds for administrative dissolution, procedure and effect. — (1) The secretary of state may administratively dissolve a limited liability company if:

(a) The limited liability company does not deliver its annual report to the secretary of state by the date on which it is due;

(b) The limited liability company is without a registered agent for sixty (60) days or more; or

(c) The secretary of state has credible information that the limited liability company has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent has been changed or that its registered agent has resigned.

(2) If the secretary of state determines that one (1) or more grounds exist under this section for dissolving a limited liability company, the secretary of state shall give notice of the determination to the limited liability company by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the limited liability company has not yet filed an annual report, to its registered agent.

(3) If the limited liability company does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty (60) days after receipt of the notice of determination, the secretary of state shall administratively dissolve the limited liability company by noting the fact of dissolution and the effective date thereof in his

records. The secretary of state shall give notice of the dissolution to the limited liability company by first class mail addressed to its mailing address as indicated on its most recent annual report or, if the limited liability company has not yet filed an annual report, to its registered agent.

(4) A limited liability company administratively dissolved continues its legal existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under sections 30-6-702 and 30-6-708, Idaho Code, and notify claimants under sections 30-6-703 and 30-6-704, Idaho Code.

(5) The administrative dissolution of a limited liability company does not terminate the authority of its registered agent.

History.

I.C., § 30-6-705, as added by 2008, ch. 176, § 1, p. 510.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. *See also* RMBCA §§ 14.20 and 14.21.

30-6-706. Reinstatement following administrative dissolution. — (1) A limited liability company that has been administratively dissolved may apply to the secretary of state for reinstatement within ten (10) years after the effective date of dissolution. The application must be delivered to the secretary of state for filing and state:

(a) The name of the company and the effective date of its dissolution;

(b) That the grounds for dissolution have been eliminated; and

(c) That the company's name satisfies the requirements of section 30-6-108, Idaho Code.

(2) If the secretary of state determines that an application under subsection (1) of this section contains the required information and that the information is correct, the secretary of state shall prepare a certificate of reinstatement that states this determination, file the original of the certificate of reinstatement, and mail a copy to the limited liability company.

(3) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume its activities as if the dissolution had not occurred.

History.

I.C., § 30-6-706, as added by 2008, ch. 176, § 1, p. 511.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 810, which was based on ULLCA § 811. *See also* RMBCA Section 14.22.

30-6-707. Appeal from rejection of reinstatement. — (1) If the secretary of state denies a limited liability company's application for reinstatement following administrative dissolution, the secretary of state shall mail the company a copy of the notice that reinstatement has been denied.

(2) Within thirty (30) days after mailing of a notice of denial of reinstatement under subsection (1) of this section, a limited liability company may appeal from the denial by petitioning the district court of Ada county to set aside the dissolution. The petition must be served on the secretary of state and contain a copy of the secretary of state's notice of dissolution, the company's application for reinstatement, and the secretary of state's notice of denial.

(3) The district court may, if grounds exist, order the secretary of state to reinstate a dissolved limited liability company or take other action the court considers appropriate.

History.

I.C., § 30-6-707, as added by 2008, ch. 176, § 1, p. 512.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 811, which was based on ULLCA § 812.

This section uses "rejection" rather than "denial" (the word used by both ULPA (2001) and ULLCA). The change is to avoid confusion with a "statement of denial" under Section 302 [§ 30-6-302].

30-6-708. Distribution of assets in winding up limited liability company's activities. — (1) In winding up its activities, a limited liability company must apply its assets to discharge its obligations to creditors, including members that are creditors.

(2) After a limited liability company complies with subsection (1) of this

section, any surplus must be distributed in the following order, subject to any charging order in effect under section 30-6-503, Idaho Code:

(a) To each person owning a transferable interest that reflects contributions made by a member and not previously returned, an amount equal to the value of the unreturned contributions; and

(b) In equal shares among members and dissociated members, except to the extent necessary to comply with any transfer effective under section 30-6-502, Idaho Code.

(3) If a limited liability company does not have sufficient surplus to comply with subsection (2)(a) of this section, any surplus must be distributed among the owners of transferable interests in proportion to the value of their respective unreturned contributions.

(4) All distributions made under subsections (2) and (3) of this section must be paid in money.

History.

I.C., § 30-6-708, as added by 2008, ch. 176, § 1, p. 512.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source: ULLCA § 806, restyled.

Subsection (a) [(1)] — This section is mostly not a default rule. *See* Section 110(c)(11) [§ 30-6-110(3)(k)] (stating that "except as provided in Section 30-6-112(2), [the operating agreement may not] restrict the rights under this chapter of a person other than a member or manager"). However, if the creditors are willing, a dissolved limited liability company may certainly make agreements with them specifying the terms under which the LLC will "discharge its obligations to creditors."

Subsections (b), (c) and (d) [(2), (3), and (4)] — These subsection provide default rules. Distributions under these subsections (or otherwise under the operating agreement) are subject to Section 503 [§ 30-6-503] (charging orders).

Part 8. Foreign Limited Liability Companies

30-6-801. Governing law. — (1) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

(a) The internal affairs of the company; and

(b) The liability of a member as member and a manager as manager for the debts, obligations or other liabilities of the company; provided however, that a foreign professional company rendering services in this state shall be subject to the laws of this state and the code of ethics or professional responsibility which are applicable to the professions in which such professional company is rendering services in this state.

(2) A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the law of the jurisdiction under which the company is formed and the law of this state.

(3) A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in this state.

History.
I.C., § 30-6-801, as added by 2008, ch. 176, § 1, p. 512.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Subsection (a) [(1)] — This Section parallels the formulation stated in Section 106 for a domestic limited liability company.

Subsection (a)(2) [(1)(b)] — This provision does not pertain to the "internal shields" of a foreign "series" LLC, because those shields do not concern the liability of members or managers for the obligations of the LLC. Instead, those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series).

30-6-802. Application for certificate of authority. — (1) A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing. The application must state:

(a) The name of the company and, if the name does not comply with section 30-6-108, Idaho Code, an alternate name adopted pursuant to section 30-6-805(1), Idaho Code;

(b) The name of the state or other jurisdiction under whose law the company is formed;

(c) The street and mailing addresses of the company's principal office and, if the law of the jurisdiction under which the company is formed requires the company to maintain an office in that jurisdiction, the street and mailing addresses of the required office;

(d) The information required by section 30-405(1), Idaho Code; and

(e) The name and mailing address of at least one (1) member or manager.

(2) A foreign limited liability company shall deliver with a completed application under subsection (1) of this section a certificate of existence or a record of similar import signed by the secretary of state or other official having custody of the company's publicly filed records in the state or other jurisdiction under whose law the company is formed.

History.
I.C., § 30-6-802, as added by 2008, ch. 176, § 1, p. 513.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 902, which was based on ULLCA § 1002.

30-6-803. Activities not constituting transacting business. — (1) Activities of a foreign limited liability company which do not constitute transacting business in this state within the meaning of this part include:

(a) Maintaining, defending or settling an action or proceeding;

(b) Carrying on any activity concerning its internal affairs, including holding meetings of its members or managers;

(c) Maintaining accounts in financial institutions;

(d) Maintaining offices or agencies for the transfer, exchange and registration of the company's own securities or maintaining trustees or depositories with respect to those securities;

(e) Selling through independent contractors;

(f) Soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;

(g) Creating or acquiring indebtedness, mortgages or security interests in real or personal property;

(h) Securing or collecting debts or enforcing mortgages or other security interests in property securing the debts and holding, protecting or maintaining property so acquired;

(i) Conducting an isolated transaction that is completed within thirty (30) days and is not in the course of similar transactions; and

(j) Transacting business in interstate commerce.

(2) For purposes of this part, the ownership in this state of income-producing real property or tangible personal property, other than property excluded under subsection (1) of this section, constitutes transacting business in this state.

(3) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation or regulation under law of this state other than this chapter.

History.

I.C., § 30-6-803, as added by 2008, ch. 176, § 1, p. 513.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 903, which was based on ULLCA § 1003.

30-6-804. Filing of certificate of authority. — Unless the secretary of state determines that an application for a certificate of authority does not comply with the filing requirements of this chapter, the secretary of state, upon payment of all filing fees, shall file the application of a foreign limited liability company, prepare, sign and file a certificate of authority to transact business in this state, and send a copy of the filed certificate, together with a receipt for the fees, to the company or its representative.

History.
I.C., § 30-6-804, as added by 2008, ch. 176, § 1, p. 514.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.

30-6-805. Noncomplying name of foreign limited liability company. — (1) A foreign limited liability company whose name does not comply with section 30-6-108, Idaho Code, may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this state, an alternate name that complies with section 30-6-108, Idaho Code. A foreign limited liability company that adopts an alternate name under this subsection and obtains a certificate of authority with the alternate name need not comply with chapter 5, title 53, Idaho Code. After obtaining a certificate of authority with an alternate name, a foreign limited liability company shall transact business in this state under the alternate name unless the company is authorized under chapter 5, title 53, Idaho Code, to transact business in this state under another name.

(2) If a foreign limited liability company authorized to transact business in this state changes its name to one that does not comply with section 30-6-108, Idaho Code, it may not thereafter transact business in this state until it complies with subsection (1) of this section and obtains an amended certificate of authority.

History.
I.C., § 30-6-805, as added by 2008, ch. 176, § 1, p. 514.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 905, which was based on ULLCA § 1005.

30-6-806. Revocation of certificate of authority. — (1) A certificate of authority of a foreign limited liability company to transact business in this state may be revoked by the secretary of state in the manner provided in subsections (2) and (3) of this section, if the company does not:

(a) Deliver its annual report by the date on which it is due as required under section 30-6-209, Idaho Code;

(b) Appoint and maintain a registered agent; or

(c) Deliver for filing a statement of a change under section 30-408, Idaho Code, within thirty (30) days after a change has occurred in the name or address of the registered agent.

(2) To revoke a certificate of authority of a foreign limited liability company, the secretary of state must mail a notice of revocation to the company's registered agent, or if the company does not appoint and maintain a proper registered agent, to the company's designated office. The notice must state:

(a) The revocation's effective date, which must be at least sixty (60) days after the date the secretary of state mails the notice; and

(b) The grounds for revocation under subsection (1) of this section.

(3) The authority of a foreign limited liability company to transact business in this state ceases on the effective date of the notice of revocation unless before that date the company cures each ground for revocation stated in the notice mailed under subsection (2) of this section.

History.

I.C., § 30-6-806, as added by 2008, ch. 176, § 1, p. 514.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 906, which was based on ULLCA § 1006.

30-6-807. Cancellation of certificate of authority. — To cancel its certificate of authority to transact business in this state, a foreign limited

liability company must deliver to the secretary of state for filing a notice of cancellation stating the name of the company and that the company desires to cancel its certificate of authority. The certificate is canceled when the notice becomes effective.

History.
I.C., § 30-6-807, as added by 2008, ch. 176, § 1, p. 515.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

30-6-808. Effect of failure to have certificate of authority. — (1) A foreign limited liability company transacting business in this state may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.

(2) The failure of a foreign limited liability company to have a certificate of authority to transact business in this state does not impair the validity of a contract or act of the company or prevent the company from defending an action or proceeding in this state.

(3) A member or manager of a foreign limited liability company is not liable for the debts, obligations or other liabilities of the company solely because the company transacted business in this state without a certificate of authority.

History.
I.C., § 30-6-808, as added by 2008, ch. 176, § 1, p. 515.

STATUTORY NOTES

Effective Dates.
Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA § 1008.

30-6-809. Action by attorney general. — The attorney general may maintain an action to enjoin a foreign limited liability company from transacting business in this state in violation of this part.

History.
I.C., § 30-6-809, as added by 2008, ch. 176, § 1, p. 515.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 908, which was based on RULPA § 908 and ULLCA § 1009.

Part 9. Actions By Members

30-6-901. Direct action by member. — (1) Subject to subsection (2) of this section, a member may maintain a direct action against another member, a manager or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship.

(2) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

History.

I.C., § 30-6-901, as added by 2008, ch. 176, § 1, p. 515.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to derivative actions and actions between members of limited liability company. 48 A.L.R.6th 1.

OFFICIAL COMMENT

Subsection (a) [(1)] — Source: ULPA (2001) § 1001(a), which was based on RUPA Section 405(b). The subsection has been somewhat re-styled from the ULPA version, and the phrase "for legal or equitable relief" has been deleted as unnecessary. ULPA's reference to "with or without an accounting" has been deleted because the reference: (i) was to the partnership remedy of accounting, which reflected the aggregate nature of a partnership and is inapposite for an *entity* such as an LLC; and (ii) generated some confusion with the equitable claim for an accounting (in the nature of a constructive trust). The "entity-analog" to the partnership-as-aggregate notion of an accounting is the distinction between a direct and derivative claim.

The last phrase of this subsection ("or arising independently ...") comes from RUPA § 405(b)(3), does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person's membership in an LLC does not preclude the person from enforcing rights existing "independently or the membership relationship."

Subsection (b) [(2)] — Source: ULPA (2001) § 1001(b). The Comment to that subsection explains:

In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. A partner does not have a direct claim against another partner merely because the other partner has breached the partnership agreement. Likewise a partner's violation of this Act does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

30-6-902. Derivative action. — A member may maintain a derivative action to enforce a right of a limited liability company if:

(1) The member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

(2) A demand under subsection (1) of this section would be futile.

History.

I.C., § 30-6-902, as added by 2008, ch. 176, § 1, p. 515.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

RESEARCH REFERENCES

A.L.R. — Construction and application of limited liability company acts — Issues relating to derivative actions and actions between members of limited liability company. 48 A.L.R.6th 1.

OFFICIAL COMMENT

Source — ULPA (2001) § 1002, which was a re-styled version RULPA § 1001.

30-6-903. Proper plaintiff. — (1) Except as otherwise provided in subsection (2) of this section, a derivative action under section 30-6-902, Idaho Code, may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.

(2) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

History.

I.C., § 30-6-903, as added by 2008, ch. 176, § 1, p. 516.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

This section abandons the traditional "contemporaneous ownership" rule, on the theory that the protections of that rule are unnecessary given the closely-held nature of most limited liability companies and the built-in, statutory restrictions on persons becoming members.

Subsection (b) [(2)] — This subsection will be inapposite if the limited liability company has only two members, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 502 [§ 30-6-502] would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action. This Act does not take a position on whether the death of member abates a direct claim against the LLC or a fellow member.

30-6-904. Pleading. — In a derivative action under section 30-6-902, Idaho Code, the complaint must state with particularity:

(1) The date and content of plaintiff's demand and the response to the demand by the managers or other members; or

(2) If a demand has not been made, the reasons a demand under section 30-6-902(1), Idaho Code, would be futile.

History.

I.C., § 30-6-904, as added by 2008, ch. 176, § 1, p. 516.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.

30-6-905. Special litigation committee. — (1) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the district court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from enforcing a person's right to information under section 30-6-410, Idaho Code, or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(2) A special litigation committee may be composed of one (1) or more disinterested and independent individuals, who may be members.

(3) A special litigation committee may be appointed:

(a) In a member-managed limited liability company:

(i) By the consent of a majority of the members not named as defendants or plaintiffs in the proceeding; and

(ii) If all members are named as defendants or plaintiffs in the proceeding, by a majority of the members named as defendants; or

(b) In a manager-managed limited liability company:

(i) By a majority of the managers not named as defendants or plaintiffs in the proceeding; and

(ii) If all managers are named as defendants or plaintiffs in the proceeding, by a majority of the managers named as defendants.

(4) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(a) Continue under the control of the plaintiff;

(b) Continue under the control of the committee;

(c) Be settled on terms approved by the committee; or

(d) Be dismissed.

(5) After making a determination under subsection (4) of this section, a special litigation committee shall file with the court a statement of its determination and its report supporting its determination, giving notice to the plaintiff. The district court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the district court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the district court shall enforce the determination of the committee. Otherwise, the district court shall dissolve the stay of discovery entered under subsection (1) of this section and allow the action to proceed under the direction of the plaintiff.

History.

I.C., § 30-6-905, as added by 2008, ch. 176, § 1, p. 516.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who

are neither plaintiffs nor defendants (if any), and bring to any judicial decision the benefits of a specially tailored business judgment.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited liability company.

Subsection (a) [(1)] — On the availability of Section 410 remedies pending the SLC's investigation, compare *Kaufman v. Computer Assoc. Int'l., Inc.*, C.A. No. 699-N, 2005 WL 3470589 at *1 (Del. Ch. Dec. 21, 2005, as revised) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of wrongdoing filed by different plaintiffs is pending in another jurisdiction;" concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case ... that the special litigation committee's motion to stay the books and records action should be denied")

Subsection (d) [(4)] — The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states.

Houle v. Low, 407 Mass. 810, 822, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

> The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment..... [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit, ... The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof — the [entity].

For a discussion of how a court should approach the question of independence, *see Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wisc. 2000).

30-6-906. Proceeds and expenses. — (1) Except as otherwise provided in subsection (2) of this section:

(a) Any proceeds or other benefits of a derivative action under section 30-6-902, Idaho Code, whether by judgment, compromise or settlement, belong to the limited liability company and not to the plaintiff; and

(b) If the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(2) If a derivative action under section 30-6-902, Idaho Code, is successful in whole or in part, the district court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company.

History.

I.C., § 30-6-906, as added by 2008, ch. 176, § 1, p. 517.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

OFFICIAL COMMENT

Source — ULPA (2001) § 1005, which was a re-styled version RULPA § 1004.

Part 10. Merger, Interest Exchange, Conversion and Domestication

30-6-1001. Applicability of Idaho entity transactions act. — (1) Unless the limited liability company is excluded therefrom by section 30-18-110, Idaho Code, and except as provided in subsection (2) of this section, a merger, interest exchange, conversion or domestication, in which a limited liability company is a party is governed by the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

(2) Section 30-6-1002, Idaho Code, applies to transactions in which a limited liability company is a party under the Idaho entity transactions act, chapter 18, title 30, Idaho Code.

History.

I.C., § 30-6-1001, as added by 2008, ch. 176, § 1, p. 517.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

IDAHO REPORTER'S COMMENT

The Idaho Entity Transactions Act governs a merger, interest exchange, conversion, or domestication in which a limited liability company is a party. As a result, nearly all of Part 10 of RULLCA was removed from the Idaho Act and replaced with a cross reference to the Idaho Entity Transactions Act.

30-6-1002. Restrictions on approval of mergers, interest exchanges, conversions and domestications. — (1) If a member of a constituent, converting or domesticating limited liability company will have personal liability with respect to a surviving, converted or domesticated organization, approval or amendment of a plan of merger, interest exchange, conversion or domestication is ineffective without the consent of the member, unless:

(a) The company's operating agreement provides for approval of a merger, interest exchange, conversion or domestication with the consent of fewer than all the members; and

(b) The member has consented to the provision of the operating agreement.

(2) A member does not give the consent required by subsection (1) of this section merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.

History.

I.C., § 30-6-1002, as added by 2008, ch. 176, § 1, p. 517.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

IDAHO REPORTER'S COMMENT

This section of the Idaho Act corresponds to RULLCA Section 1014.

PART 11. MISCELLANEOUS PROVISIONS

30-6-1101. Uniformity of application and construction. — In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History.

I.C., § 30-6-1101, as added by 2008, ch. 176, § 1, p. 518.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

30-6-1102. Relation to electronic signatures in global and national commerce act. — To the extent this chapter modifies, limits and supersedes the federal electronic signatures in global and national commerce act, 15 U.S.C. section 7001 et seq., this chapter does not modify, limit or supersede section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b).

History.

I.C., § 30-6-1102, as added by 2008, ch. 176, § 1, p. 518.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

30-6-1103. Savings clause. — This chapter does not affect an action commenced, proceeding brought, or right accrued before this chapter takes effect.

History.

I.C., § 30-6-1103, as added by 2008, ch. 176, § 1, p. 518.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010. See § 30-6-1104.

30-6-1104. Application to existing relationships. — (1) Before July 1, 2010, this chapter governs only:

(a) A limited liability company formed on or after July 1, 2008; and

(b) Except as otherwise provided in subsection (3) of this section, a limited liability company formed before July 1, 2008, which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this chapter.

(2) Except as otherwise provided in subsection (3) of this section, on and after July 1, 2010, this chapter governs all limited liability companies.

(3) For the purposes of applying this chapter to a limited liability company formed before July 1, 2008:

(a) The company's articles of organization are deemed to be the company's certificate of organization; and

(b) For the purposes of applying section 30-6-102(10), Idaho Code, and subject to section 30-6-112(4), Idaho Code, language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

History.

I.C., § 30-6-1104, as added by 2008, ch. 176, § 1, p. 518.

STATUTORY NOTES

Effective Dates.

Section 6 of S.L. 2008, ch. 176 provided that the enactment of this section should take effect on and after July 1, 2008 and that the repeal of the former Idaho Limited Liability Act, chapter 6, title 53, Idaho Code, should take effect on or after July 1, 2010.

OFFICIAL COMMENT

Subsection (c) [(3)] — When a pre-existing limited liability company becomes subject to this Act, the company ceases to be governed by the predecessor act, including whatever requirements that act might have imposed for the contents of the articles of organization.

IDAHO REPORTER'S COMMENT

Until July 1, 2010, the predecessor Idaho Limited Liability Company Act (Idaho Code Sections 53-601 *et seq.*) governs all limited liability companies formed prior to July 1, 2008, that do not elect to be subject to this Idaho Act in the interim.

CHAPTER 7

BRIDGE, FERRY, FLUME, AND BOOM CORPORATIONS

30-701. License to take tolls. — When a corporation is formed for the construction and maintenance of a bridge, ferry, flume or boom, or for two (2) or more of said purposes, it must not take tolls on or for the same until authority is granted therefor by the boards of county commissioners of the county or counties where its flume or abutments, landings or anchorages are situate. But after such authority is granted it may demand and receive such tolls as it is so authorized to take, and may, when necessary, secure the right of way for its flume, and the necessary chutes, raceways, landings, abutments and anchorages under the provisions of the Code of Civil Procedure.

History.
R.S. § 2694; reen. R.C. & C.L., § 2830; C.S., § 4829; I.C.A., § 29-701.

STATUTORY NOTES

Compiler's Notes.
The Code of Civil Procedure is a division of the Idaho Code, consisting of Titles 1 through 13.

JUDICIAL DECISIONS

Cited in: Falls Creek Timber Co. v. Day, 39 Idaho 495, 228 P. 313 (1924).

30-702. When franchise ceases. — Every such corporation hereafter organized ceases to be a body corporate:

1. If, within two (2) years from filing its articles of incorporation it has not commenced the construction of its bridge, flume or boom, as the case may be, and if within three (3) years from such filing its bridge or boom is not completed.
2. If, when the bridge or boom of such corporation is destroyed, it is not reconstructed and ready for use within two (2) years thereafter.
3. If the ferry of any such corporation is not in running order within four (4) months after authority to take tolls thereon is obtained, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

History.
R.S., § 2695; reen. R.C. & C.L., § 2831; C.S., § 4830; am. 1925, ch. 165, § 1, p. 302; I.C.A., § 29-702.

30-703. Application to individuals. — When a bridge, ferry, flume or boom is operated or owned by a natural person, this chapter is applicable to such person in like manner as it is applicable to corporations.

History.
R.S., § 2696; reen. R.C. & C.L., § 2832; C.S., § 4831; I.C.A., § 29-703.

STATUTORY NOTES

Cross References.
Telegraph, telephone, and electric power corporations, § 62-701 et seq.

CHAPTER 8

WATER AND CANAL CORPORATIONS AND WATER USERS' ASSOCIATIONS

30-801. Contracts for municipal water supply. — No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but an exclusive right must not be granted. No contract or grant must be made for a term exceeding fifty (50) years.

History.
R.S., § 2710; reen. R.C., § 2838; compiled and reen. C.L., § 2838; C.S., § 4842; I.C.A., § 29-801.

STATUTORY NOTES

Cross References.
Certificate of convenience and necessity required from public utilities commission before exercising right or obtaining franchise, § 61-527.

Determination of rates by public utilities commission, § 61-502.

Public utilities commission, jurisdiction over public utilities, § 61-501.

JUDICIAL DECISIONS

Analysis

Application to corporations only.
Grant for indefinite term.
Irrigation.
Pleading.

Application to Corporations Only.
This law applies only to corporations furnishing water to cities, etc., and has no application to contract between individual and city for furnishing such water. Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1903).

Grant for Indefinite Term.
Municipal grant to individuals, for indefinite term, of the right to lay pipes in city streets and to repair pipes of a water distributing system, if affected at all by this section, is not rendered thereby ineffective, but at

most is limited to a term of fifty years. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Irrigation.
This law, applicable to water corporations, furnishing water to cities and towns, was not intended to apply to corporations furnishing water for irrigation purposes. MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909).

Pleading.
In action to compel water company to furnish city with free water in case of fire, complaint must set forth the ordinance and contract by which company is authorized to supply water to city. City of Boise City v. Artesian Hot & Cold Water Co., 4 Idaho 351, 39 P. 562 (1895).

Cited in: Cox v. City of Pocatello, 77 Idaho 225, 291 P.2d 282 (1955).

30-802. Right of way granted. — Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and aqueducts in conducting water from outside points to the corporate limits of said city or town.

History.
R.S., § 2712; am. 1905, p. 192, § 2; reen. R.C. & C.L., § 2840; C.S., § 4843; I.C.A., § 29-802.

JUDICIAL DECISIONS

ANALYSIS

Compensation.
Nature of grant.
Pipes in street.
Rental for use of streets.

Compensation.
Rights of way under this section are granted without requiring any compensation whatever. City of Pocatello v. Murray, 21 Idaho 180, 120 P. 812, aff'd, 226 U.S. 318, 33 S. Ct. 107, 57 L. Ed. 239 (1912).

Nature of Grant.
Municipal grant of right to occupy city streets with pipes of a water distributing system is, when accepted by grantee, not a mere revocable license, but a substantial property right. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Pipes in Street.
All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of company to construct same at its own expense and connect with the pipes of a property owner at the line of his property and the limit of its franchise. Bothwell v. Consumers' Co., 13 Idaho 568, 92 P. 533 (1907).

It is the duty of water company to supply and lay the laterals from its main pipeline to line of consumer's property abutting on the street, and such laterals are the property of company. Hatch v. Consumers' Co., 17 Idaho 204, 104 P. 670 (1909), aff'd, 224 U.S. 148, 32 S. Ct. 465, 56 L. Ed. 703 (1912).

Rental for Use of Streets.
Obligation of municipal ordinance granting an irrevocable easement to lay pipes in city streets and repair pipes of a water distributing system is unconstitutionally impaired by a subsequent ordinance requiring payment to city of a monthly rental for such use and occupation of streets. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Cited in: City of Boise City v. Artesian Hot

& Cold Water Co., 4 Idaho 351, 39 P. 562 (1895); Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1905); MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909).

30-803. Works not to obstruct highways. — All waterworks must be so laid and constructed as not to obstruct public highways.

History.
R.S., § 2713; am. R.C. & C.L., § 2841; C.S., § 4844; I.C.A., § 29-803.

STATUTORY NOTES

Cross References.
Bridges over ditches and canals, §§ 42-1205, 43-906.

JUDICIAL DECISIONS

Cited in: Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1903); MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909); Nampa v. Nampa & Meridian Irrigation Dist., 23 Idaho 422, 131 P. 8 (1913).

30-804. Water users' associations — Exemptions from taxes. — Any water users' association which is organized in conformity with the requirements of the United States under the Reclamation Act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be governed by the provisions of the Idaho Nonprofit Corporation Act.

History.
1905, p. 373, § 3; reen. R.C. & C.L., § 2842; C.S., § 4845; I.C.A., § 29-804; am. 1979, ch. 159, § 4, p. 486.

STATUTORY NOTES

Cross References.
Lateral ditch water users' associations, § 42-1301 et seq.

Federal References.
The Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, is generally compiled as 43 USCS § 371 et seq.

Compiler's Notes.
The Idaho Nonprofit Corporation Act, referred to in this section, is compiled as ch. 3, title 30, Idaho Code.

30-805. Water users' associations — Record of articles and subscriptions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised S.L. 1905, p. 373, § 4; reen. R.C. & C.L. § 2843; C.S. § 4846; I.C.A., § 29-805, was repealed by S.L. 1979, ch. 159, § 5.

30-806. Annual report of irrigation companies. — It shall be the duty of any corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof in this state, to

file, before the first Monday in January in each year, in the office of the county recorder of every county in which said company distributes water under such sale or rental, upon a blank form to be prepared and furnished by him upon application, and a duplicate copy thereof with the department of water resources, a statement showing the condition of the business of said corporation on December thirty-first of the preceding year, which statement shall include the following:

1. A general description of the property of the company.
2. A statement of its cost and estimated present value.
3. The total amount and the character of all indebtedness of the company, including a list of all perpetual water rights sold and outstanding and their respective dates of execution, and the amount received from such sales.
4. The amount due to said company and from what sources.
5. The income of the company during the preceding calendar year and from what sources.
6. The expenditures by the company during the same period and for what purposes.
7. The total area of land watered from its works during the preceding season; that part of said area having no water rights attached being given separately.
8. The number of acres of land under said ditch susceptible of irrigation.
9. The capacity of its works and the quantity of water carried during the said season as nearly as known.
10. The amounts of recorded appropriations and the date of each.

Said statement shall be sworn to by the proper official of said corporation. If the proper official, or principal accounting officer of said corporation shall neglect or refuse to file the statement herein required, the said recorder shall notify him of such failure, and if for thirty (30) days after said notification he still neglects or refuses to file such statement, he shall be guilty of a misdemeanor, and shall be subject to a fine not exceeding $300, or to imprisonment in the county jail of his county for not more than six (6) months, or to both such fine and imprisonment. Said statement required to be filed under this section shall be kept on file in the office of said recorder and shall be open to inspection.

History.
1899, p. 380, § 35; reen. R.C. & C.L., § 2844; C.S., § 4847; I.C.A., § 29-806.

STATUTORY NOTES

Cross References.
Department of water resources, § 42-1701 et seq.

JUDICIAL DECISIONS

Cited in: McDuffee v. Hayden-Coeur d'Alene Irrigation Co., 25 Idaho 370, 138 P. 503 (1913).

CHAPTER 9

IDAHO ESCROW ACT

30-901. Short title. — (1) This chapter shall be known and may be cited as the "Idaho Escrow Act."

(2) It is the intent of the legislature that the escrow industry be supervised and regulated by the department of finance in order to protect the citizens of the state and to provide that the business practices of the escrow industry are fair and orderly, with due regard to the ultimate consumers in this important area of property protection.

History.

I.C., § 30-901, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Department of finance, § 67-2701 et seq.

Prior Laws.

Former § 30-901, which comprised 1901, p. 26, § 1; am. 1907, p. 545, § 1; am. R.C. & C.L., § 2961; C.S., § 4858; I.C.A., § 29-901; am. 1951, ch. 139, § 1, p. 324, was repealed by S.L. 2005, ch. 236, § 1.

30-902. Definitions. — As used in this chapter and in rules promulgated pursuant to this chapter:

(1) "Act" means the "Idaho Escrow Act," chapter 9, title 30, Idaho Code.

(2) "Department" means the Idaho department of finance.

(3) "Director" means the director of the Idaho department of finance.

(4) "Escrow" means any transaction in which any person, for the purpose of effecting the sale, transfer, encumbrance, or lease of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when the instrument,

money, evidence of title or thing of value is then to be delivered by the third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter, pursuant to written instructions.

(5) "Escrow agency" means any person engaged in the business of accepting or receiving escrows for deposit or delivery by any means, including over the internet, or by any other electronic means.

(6) "Escrow agent" means any person engaged in the business of accepting or receiving escrows for deposit or delivery on behalf of an escrow agency.

(7) "License" means a license issued pursuant to this chapter.

(8) "Licensee" means a person holding a valid license as an escrow agency under this chapter.

(9) "Person" means an individual, cooperative, association, company, firm, partnership, corporation, limited liability company, or other legal entity, or the plural thereof, whether or not resident, nonresident or citizen.

History.

I.C., § 30-902, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Prior Laws.

Former § 30-902, which comprised 1901, p. 26; am. 1907, p. 545, § 2; reen. R.C. & C.L., § 2962; C.S., § 4859; I.C.A., § 29-902, was repealed by S.L. 1979, ch. 105, § 1.

30-903. License required. — (1) It shall be unlawful for any person to directly or indirectly engage in or carry on, or purport to engage in or carry on, the business of, or act in the capacity of, an escrow agency in or from Idaho without first obtaining a license under this chapter.

(2) The requirements of this chapter shall also apply to any escrow transaction effecting the sale, transfer, encumbrance or lease to another person of any real or personal property located in Idaho.

History.

I.C., § 30-903, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-903, which comprised 1901, p. 26, § 2; reen. R.C. & C.L., § 2963; C.S., § 4860; I.C.A., § 29-903, was repealed by S.L. 2005, ch. 236, § 1.

30-904. Place of business. — No licensee under this chapter shall engage in the escrow business at any place of business for which it does not hold a license, nor shall it engage in business under any other name than that on the license. Every escrow agency licensed under this chapter shall maintain a home office as its principal location for the transaction of escrow business. The director may, on application, issue additional branch licenses

to the same escrow agency licensee upon compliance with all the provisions of this chapter governing the issuance of a single escrow agency license.

History.
I.C., § 30-904, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.
Former § 30-904, which comprised 1901, p. 26, § 3; reen. R.C. & C.L., § 2964; C.S., § 4861; I.C.A., § 29-904; am. 1935, ch. 77, § 1, p. 131; am. 1951, ch. 139, § 2, p. 324, was repealed by S.L. 2005, ch. 236, § 1.

30-905. Exempt persons and transactions. — The requirements of this chapter do not apply to:

(1) Any person licensed to practice law in this state while engaged in the performance of his professional duties, except an attorney or law firm actively engaging in a separate business as an escrow agency;

(2) Any person licensed or chartered under the laws of any state or of the United States as a bank, savings and loan association, credit union or industrial loan company as well as wholly-owned subsidiaries and affiliates of such organizations;

(3) Title insurance companies having a valid certificate of authority, and title insurance agents having a valid license as a title insurance agent, issued by the Idaho department of insurance;

(4) Any real estate company, broker or salesperson licensed by and subject to the jurisdiction of the Idaho real estate commission, while performing acts in the course of or incidental to sales or purchases of real or personal property handled or negotiated by such real estate company, broker or salesperson;

(5) Any receiver, trustee in bankruptcy, executor, administrator, guardian or other person acting under the supervision or order of any court of this state or of any federal court;

(6) A person licensed in this state as a certified public accountant while engaged in the performance of his professional duties who is not actively engaged in a separate business as an escrow agency;

(7) Any state or federally chartered nondepository financial institution;

(8) Regulated lenders subject to the requirements of the Idaho credit code, chapters 41 through 46, title 28, Idaho Code, to the extent not engaged in a separate business as an escrow agency;

(9) Agencies of the United States and agencies of this state and their political subdivisions;

(10) Mortgage brokers and mortgage lenders subject to the requirements of the Idaho residential mortgage practices act, chapter 31, title 26, Idaho Code, to the extent not engaged in a separate business as an escrow agency; or

(11) A mortgage company to the extent that such mortgage company is regularly engaged in the business of a mortgage company as defined in the mortgage company act, chapter 28, title 26, Idaho Code.

History.
I.C., § 30-905, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.
Department of insurance, § 41-201 et seq.
Real estate commission, § 54-2005.

Prior Laws.
Former § 30-905, which comprised 1935, ch. 150, § 1, p. 368, was repealed by S.L. 2005, ch. 236, § 1.

30-906. Exemption — Burden of proof. — In any proceeding or action under this chapter, the burden of proving an exemption from the requirements of this chapter is upon the person claiming the exemption.

History.
I.C., § 30-906, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.
Former § 30-906, which comprised 1901, p. 26, § 4; reen. R.C. & C.L., § 2965; C.S., § 4862; I.C.A., § 29-905, was repealed by S.L. 2005, ch. 236, § 1.

30-907. Director's issuance or denial of license. — (1) The director shall receive and act upon all applications for licenses to engage in business as an escrow agency under this chapter. If the director finds that all requirements of statute and rule have been met and all applicable fees paid, and the applicant is not otherwise unqualified for licensure, the director shall issue a license to the applicant.

(2) An application for a license as an escrow agency shall be in writing and filed with the director in such form as is prescribed by the director, shall include such information as the director may reasonably require, and shall be verified on oath by the applicant. Such information shall be updated and filed with the director as necessary to keep the information current. The application for licensure shall be accompanied by an application fee of three hundred fifty dollars ($350). When an application for licensure is denied or withdrawn, the director shall retain all fees paid by the applicant.

(3) An application for an escrow agency license under this chapter may be denied if the director finds that:

(a) The escrow agency's business was or will be formed for any business other than legitimate escrow services, or proposes to use a name that is misleading or in conflict with the name of an existing licensee;

(b) Any incorporator, officer, director, member, general partner, employee or agent of the escrow agency applicant has been:

(i) Convicted of, or received a withheld judgment for, any felony; or

(ii) Convicted of, or received a withheld judgment for, a misdemeanor involving dishonesty or moral turpitude; or

(iii) Committed any crime or act involving dishonesty, fraud or deceit,

which crime or act is substantially related to the qualifications, functions or duties of a person engaged in an escrow business;

(c) There is no natural person possessing a minimum of three (3) years of supervisory experience in relation to an escrow business supervising each escrow agency office;

(d) The applicant or any officer, director, member, general partner, employee or agent of the applicant has demonstrated lack of fitness to transact escrow business;

(e) The applicant has made any false statement of a material fact in the application for a license; or

(f) The applicant, any officer, director, member, general partner or any person owning or controlling, directly or indirectly, ten percent (10%) or more of the outstanding equity securities of the applicant has violated any provision of this chapter or rules promulgated thereunder, or any similar regulatory scheme in this state or in any foreign jurisdiction.

History.

I.C., § 30-907, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 1, p. 858.

STATUTORY NOTES

Prior Laws.

Former § 30-907, which comprised 1901, p. 26, § 5; reen. R.C. & C.L., § 2966; C.S., § 4863; I.C.A., § 29-906, was repealed by S.L. 2005, ch. 236, § 1.

Amendments.

The 2008 amendment, by ch. 311, in paragraph (3)(b)(i), deleted "or a misdemeanor involving dishonesty or moral turpitude" from the end; added paragraph (3)(b)(ii) and redesignated former paragraph (3)(b)(ii) as paragraph (3)(b)(iii).

30-908. Renewal of license. — (1) On or before April 30 of each year, every licensee under this chapter shall pay an annual license renewal fee of one hundred fifty dollars ($150), and shall file with the director a renewal form containing such information as the director may require.

(2) As a condition of renewal, each licensee shall file with the director a statement of its financial condition and status of its escrow transactions as of the preceding December 31. The financial statement must be in a form and contain the information prescribed by the director.

(3) Each license under this chapter shall remain in full force and effect unless the licensee fails to timely satisfy the renewal requirements of this section, or the license is relinquished, suspended or revoked; provided however, branch licenses shall be terminated upon the relinquishment or revocation of a home office license. Any licensee may relinquish the license by notifying the director of its relinquishment, but this relinquishment shall not affect the licensee's liability for acts previously committed, and may not occur after the filing of a complaint for revocation or suspension of the license.

(4) Following the failure of a licensee to satisfy the renewal requirements of this section, a person previously licensed as an escrow agency may, for an additional nonrefundable fee of two hundred dollars ($200), apply for the reinstatement of its previous license provided that he satisfies the renewal

requirements of this section no later than the last business day of May immediately following expiration of such license.

History.
I.C., § 30-908, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.
Former § 30-908, which comprised 1901, p. 26, § 6; reen. R.C. & C.L., § 2967; C.S., § 4864; I.C.A., § 29-907, was repealed by S.L. 2005, ch. 236, § 1.

30-909. Financial responsibility — Fidelity bond — Errors and omissions policy — Surety bond. — At the time of filing an application for an escrow agency license, and at the time of any renewal or reinstatement of such license, the applicant or licensee shall provide satisfactory evidence to the director of having obtained the following as evidence of financial responsibility:

(1) A fidelity bond providing coverage in the aggregate amount of two hundred thousand dollars ($200,000) with a deductible no greater than ten thousand dollars ($10,000) covering the applicant or licensee, as well as each corporate officer, partner, managing member, escrow agent and employee of the applicant or licensee;

(2) An errors and omissions policy issued to the escrow agency providing coverage in the minimum aggregate amount of fifty thousand dollars ($50,000) or, alternatively, cash or securities in such amount deposited in a depository approved by the director on condition that they be available for payment of any claim payable under an equivalent errors and omissions policy in such amount; and

(3) A surety bond in an amount as set forth in paragraphs (a) through (f) of this subsection. The surety bond shall be in a form provided by the director and the applicant shall be named as principal. The bond shall be executed by the applicant as obligor and by a company authorized to do a surety business in Idaho. The bond shall be conditioned that the obligor as licensee will faithfully conform to and abide by this chapter and all rules adopted thereunder, and shall be liable for reimbursement to all persons who suffer loss by reason of a violation of this chapter or rules adopted thereunder. The surety bond provided shall be in an amount based upon the average month-end balance of the escrow trust accounts of the applicant or licensee for the preceding calendar year, in increments as described in the following subsections [paragraphs]:

(a) For average month-end escrow trust account balances of fifty thousand dollars ($50,000) or less, a surety bond in the amount of twenty thousand dollars ($20,000) is required;

(b) For average month-end escrow trust account balances of more than fifty thousand dollars ($50,000) but not more than two hundred fifty thousand dollars ($250,000), a surety bond in the amount of fifty thousand dollars ($50,000) is required;

(c) For average month-end escrow trust account balances of more than two hundred fifty thousand dollars ($250,000) but not more than five

hundred thousand dollars ($500,000), a surety bond in the amount of one hundred thousand dollars ($100,000) is required;

(d) For average month-end escrow trust account balances of more than five hundred thousand dollars ($500,000) but not more than seven hundred fifty thousand dollars ($750,000), a surety bond in the amount of one hundred fifty thousand dollars ($150,000) is required;

(e) For average month-end escrow trust account balances of more than seven hundred fifty thousand dollars ($750,000) but not more than one million dollars ($1,000,000), a surety bond in the amount of two hundred thousand dollars ($200,000) is required;

(f) For average month-end escrow trust account balances of more than one million dollars ($1,000,000), a surety bond in the amount of two hundred fifty thousand dollars ($250,000) is required.

(4) The escrow agency licensee shall place on file with the director the surety bond and proof of its errors and omissions coverage and its fidelity bond, which bonds and insurance coverage shall be continuous during the period of licensure of the licensee whether or not the bond is renewed, continued, reinstated, reissued, or otherwise extended, replaced or modified, including increases or decreases in the penal sum. The surety upon the bond shall not be liable in an aggregate amount exceeding the penal sum set forth on the face of the bond.

(5) The surety bond shall name as beneficiaries:

(a) The state, for payment of any costs incurred and charges made in connection with any escrow agency's insolvency or default, including costs and charges relating to an examination and receivership of any escrow agency; and

(b) Any person who has a claim against the surety on the bonds based on any default or violation of any duty or obligation of the escrow agency.

(6) In lieu of the bonds required by this section, a certificate of deposit issued by a financial institution authorized to conduct business in Idaho and made payable to the director may be provided to the director in the same principal amount as required for the bonds. The interest on the certificate of deposit shall be payable to the escrow agency licensee. The certificate of deposit shall be maintained at all times during which the licensee is authorized to engage in business as an escrow agency under this chapter, and must provide that it will remain in effect for at least three (3) years following discontinuance of operations unless released earlier by the director.

(7) The director may, in the public interest and for good cause shown, waive or modify any requirements of this section.

History.

I.C., § 30-909, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-909, which comprised I.C., § 30-909, as added by 1973, ch. 135, § 11, p. 252, was repealed by S.L. 2005, ch. 236, § 1.

Compiler's Notes.

The bracketed insertion in the introductory paragraph in subsection (3) was added by the compiler to provide the probable intended term.

30-910. Cancellation of fidelity bond, surety bond, or both — New bond required. — Prior to cancellation of either the fidelity bond or the surety bond required by section 30-909, Idaho Code, or both, the escrow agency licensee shall file with the director satisfactory evidence of a new bond in the appropriate amount with no lapse in coverage from the canceled bond. Failure to do so shall be grounds for the suspension or revocation of the escrow agency's license.

History.

I.C., § 30-910, as added by 2005, ch. 236, § 2, p. 717.

30-911. Limitation of actions on bond. — No action may be brought on an escrow agency licensee's bond by any person after the expiration of three (3) years from the time when the act or default complained of becomes known or should have become known.

History.

I.C., § 30-911, as added by 2005, ch. 236, § 2, p. 717.

30-912. Transferability. — A license issued under this chapter is not transferable or assignable, and control of a license shall not be acquired through stock purchase or other device without the prior written consent of the director.

History.

I.C., § 30-912, as added by 2005, ch. 236, § 2, p. 717.

30-913. Unlawful acts. — Any person, except a person exempt under section 30-905, Idaho Code, who engages in activity as an escrow agency without first obtaining a license in accordance with this chapter, shall be guilty of a felony. Such person is also subject to a civil penalty in an amount no greater than five thousand dollars ($5,000) for each violation of this chapter or rule or order thereunder, in addition to other sanctions allowed by law.

History.

I.C., § 30-913, as added by 2005, ch. 236, § 2, p. 717.

30-914. Accounts to be maintained — Records open to inspection — Retention of records — Trust account — Interest on escrow accounts. — (1) Each licensee shall maintain sufficient books, accounts and records readily accessible to the department for the department to determine at any time the licensee's financial condition, what duties and responsibilities the licensee has undertaken to perform and whether it is

properly performing all such duties, and any other information considered necessary by the director to determine whether the licensee is operating in a safe, competent and lawful manner. The books, records and accounts shall be maintained in accordance with generally accepted accounting principles and sound business practice.

(2) For each individual escrow account, the licensee shall maintain the escrow agreement and all amendments, all instructions affecting the agreement, all related correspondence, and an individual ledger reflecting all activity pertinent to that account.

(3) Each licensee shall continuously maintain the following general accounts:

(a) A general ledger reflecting assets, liabilities, income, expenses and equity accounts;

(b) An escrow liability control ledger for all escrow accounts;

(c) A cash receipts and disbursements journal; and

(d) Copies of all receipts and disbursements used as a medium of posting to individual escrow accounts.

(4)(a) Every licensee shall keep a separate escrow trust fund account established at a financial institution approved by the director, in which shall be kept separate, distinct and apart and segregated from the licensee's own funds, all funds or moneys of clients which are being held in trust by the licensee pending the closing of an escrow transaction or the full performance of the escrow agreement. All trust funds shall be deposited not later than the first banking day following receipt thereof. Such funds, when deposited, shall be designated as "escrow accounts" or given some other appropriate designation indicating that the funds are not the funds of the licensee.

(b) Every licensee shall maintain all other assets or property received pursuant to an escrow in accordance with a written escrow agreement in a manner which will reasonably preserve and protect the property from loss, theft or damage, and which will otherwise comply with all duties and responsibilities of a fiduciary or bailee generally.

(5) The records referenced in this section shall be reconciled at least monthly.

(6) All records referenced in this section shall be maintained by the licensee for seven (7) years following the close of each account.

(7) Any interest received on funds deposited with an escrow agency in connection with an escrow must be paid over to the depositing party to the escrow and may not be transferred to an account of the escrow agency. This section shall not limit the right of the escrow agency to contract with the depositing party with respect to the interest received on the deposits by independent agreement.

History.

I.C., § 30-914, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 2, p. 859.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 311, substituted "financial institution approved by the director" for "financial institution located in Idaho" in the first sentence in paragraph (4)(a).

30-915. Notice of conflict of interest — Closing statement. — (1) An escrow agency licensee shall act without partiality to any of the parties to the escrow. An escrow agency may not close a transaction where it has, directly or indirectly, a monetary interest in the subject property either as buyer or seller. If an escrow agency has a business interest in the escrow transaction other than as the escrow agency licensee, the relationship or interest must be disclosed in the written escrow instructions. After noting such interest, an additional statement shall appear as follows: "We call this interest to your attention for disclosure purposes. This interest will not, in our opinion, prevent us from being a fair and impartial escrow agency in this transaction, but you are, nevertheless, free to request the transaction be handled by some other escrow agency."

(2) On completion of an escrow transaction, the escrow agency licensee shall deliver to each principal a signed written closing statement. The closing statement shall show all receipts and disbursements relating to the escrow transaction. Any charges by, or disbursements to, the escrow agency shall be clearly noted.

History.

I.C., § 30-915, as added by 2005, ch. 236, § 2, p. 717.

30-916. Attachment. — Funds or other value received by a licensee under this chapter pursuant to an escrow or trust funds are not subject to execution or attachment in any claim against the licensee.

History.

I.C., § 30-916, as added by 2005, ch. 236, § 2, p. 717.

30-917. Examination and investigations. — (1) The director shall examine the books, records and accounts of each licensee, within or without the state of Idaho, at intervals he deems necessary for the protection of the public. The licensee so examined shall pay a fee for the examination at the rate fixed annually by the director, not to exceed fifty dollars ($50.00) per examination hour. If it is necessary for the examination to be conducted outside of Idaho, the actual cost of travel for the examiners shall be reimbursed to the department of finance by the licensee so examined. The director, upon his prior written approval, may accept an equivalent examination of a licensee by another state or federal agency as a substitute for the examination pursuant to this section.

(2) The director may make necessary public or private investigations within or outside of Idaho to determine whether any person has violated or is about to violate this chapter or any rule or order under this chapter.

(3) For the purpose of any investigation or other proceeding under this

chapter, the director or any officer designated by the director may administer oaths or affirmations, and upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, and require the production of any matter which is relevant to the investigation or other proceeding, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge or relevant facts, or any other matter reasonably calculated to lead to the discovery of material evidence. Upon failure to obey a subpoena or to answer questions proposed by the investigating officer and upon reasonable notice to all persons affected thereby, the director may apply to any district court for an order compelling compliance.

(4) Except as otherwise provided in this chapter, all proceedings under this chapter shall be conducted in accordance with the administrative procedure act, chapter 52, title 67, Idaho Code.

History.
I.C., § 30-917, as added by 2005, ch. 236, § 2, p. 717.

30-918. Powers and duties of the director. — (1) In addition to any other powers and duties of the director authorized by law, the director may issue orders and promulgate rules that, in the opinion of the director, are necessary to execute, enforce and effectuate the purposes of this chapter.

(2) The director shall also:

(a) Administer and enforce the provisions and requirements of this chapter; and

(b) Require that all funds collected by the department under this chapter be deposited into the finance administrative account pursuant to section 67-2702, Idaho Code.

History.
I.C., § 30-918, as added by 2005, ch. 236, § 2, p. 717.

30-919. Prohibited practices. — No escrow agency licensee or person required to be licensed under this chapter, or any of its officers, directors, members, general partners, employees or agents shall:

(1) Issue, circulate, make use of, publish or advertise, by any means of communication, that a person is engaged in accepting or receiving escrows if that person is not licensed under this chapter;

(2) Solicit or accept an escrow instruction or amended or supplemental escrow instruction containing any blank to be filled in after signing or initialing of the escrow instruction or permitting any person to make any addition to, deletion from, or alteration of an escrow instruction or amended or supplemental escrow instruction unless the addition, deletion or alteration is signed or initialed by any affected party who signed or initialed the escrow instruction or amended or supplemental escrow instruction prior to the addition, deletion or alteration;

(3) Fail to carry out an escrow transaction pursuant to the written escrow

instructions unless amended by the written agreement of all parties to the escrow agreement or their assigns;

(4) Accept funds or papers in escrow without a dated, written instruction signed by the parties, or their authorized representatives, adequate to administer the escrow account and to provide for sufficient funds and documents to carry out the terms of the escrow instructions. Funds and documents deposited shall be used only in accordance with such written instruction; provided that if additional specific instructions are needed, the escrow agency shall obtain the consent of both parties or such representatives to the escrow or an order of a court of competent jurisdiction at the expense of the escrow parties;

(5) Fail to promptly distribute funds, deeds or other personal property or instruments pursuant to escrow instructions;

(6) Fail to submit to an examination by the department of its books, records and accounts, or refuse to provide to the department, within a reasonable time, all information requested by the department pursuant to this chapter;

(7) Fail to deliver, without reasonable cause, within a reasonable time after the close of an escrow, to the respective parties of an escrow transaction, any money, documents or other properties held in escrow in violation of the provisions of the escrow instructions;

(8) Directly or indirectly employ any scheme, device or artifice to defraud or mislead any person or engage in any unfair or deceptive practice toward any person;

(9) Fail to supervise diligently and control the escrow-related activities of its agents, employees and independent contractors;

(10) Engage in fraudulent or dishonest abstraction or misappropriation or embezzlement of funds or other property held in trust;

(11) Pay a fee or give any portion of its fees or charges, including fees for escrow services or other consideration, to any person as an inducement or as compensation for the referral of any escrow business; or

(12) Disburse funds or deliver documents from an escrow for recording or otherwise unless the escrow contains a credit balance consisting of collected funds, other than funds of the escrow agency or its affiliates, sufficient to discharge all monetary conditions of the escrow. This requirement does not apply to escrows established for the purpose of receiving two (2) or more periodic payments over a total period of time after establishment in excess of thirty (30) days.

History.
I.C., § 30-919, as added by 2005, ch. 236, § 2, p. 717.

30-920. Remedies. — (1) Whenever it appears to the director that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order thereunder, is conducting its business in an unsafe and injurious manner, or that its capital or assets are impaired, the director may in his discretion:

(a) Order the person to cease and desist from the violation of any provision of this chapter, rule or order thereunder;
(b) Issue an order revoking or suspending the licensee's escrow agency license;
(c) After notice and the opportunity for a hearing, except as otherwise provided in this chapter, issue an order imposing a civil penalty not to exceed five thousand dollars ($5,000) for each violation of this chapter or any rule or order thereunder;
(d) After notice and the opportunity for a hearing, issue an order of restitution to any person for loss of money or property resulting from a violation of this chapter; and
(e) Issue an order, pursuant to section 67-5247, Idaho Code, impounding the accounts, including all operating and trust accounts, of any licensee or person required to be licensed under this chapter.

(2) In addition to such remedies, the director may bring an action in the fourth district court in and for Ada county or in such other court as the director deems appropriate. Upon a proper showing, the court may:
(a) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;
(b) Order other appropriate or ancillary relief, which may include:
(i) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the director, for the defendant or the defendant's assets;
(ii) Ordering the director to take charge and control of a defendant's property, including investment accounts and accounts in a financial institution, rents and profits; to collect debts; and to acquire and dispose of property;
(c) Issue an order of restitution to any person for loss of money or property resulting from a violation of this chapter; and
(d) Except as otherwise provided by this chapter, impose a civil penalty not to exceed five thousand dollars ($5,000) for each violation.

(3) The court may not require the director to post a bond.

History.
I.C., § 30-920, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 3, p. 860.

STATUTORY NOTES

Amendments.
The 2008 amendment, by ch. 311, added paragraphs (1)(d) and (1)(e); rewrote paragraph (2)(a), which formerly read: "Grant a temporary restraining order, followed by a preliminary injunction and a permanent injunction for the department or receiver to exercise control of, operate or liquidate an escrow agency's business in this state, or such other injunctive relief as appropriate; and"; and added paragraphs (2)(b) and (2)(c), and redesignated former paragraph (2)(b) as paragraph (2)(d).

30-921 — 30-930. [Reserved.]

30-931. No impairment of other remedies. — Nothing in this chapter shall be construed so as to impair or affect any statutory or common law

right of any person to bring an action in any court having jurisdiction for any act involved in the transaction of an escrow business or the right of the state of Idaho to sanction any person for any violation of any provision of this chapter.

History.
I.C., § 30-931, as added by 2005, ch. 236, § 2, p. 717.

30-932. Continuing jurisdiction. — If a license under this chapter is surrendered, suspended or revoked, the former licensee shall continue to be subject to the provisions of this chapter and to the duties previously undertaken for so long as it acts as a fiduciary with respect to any escrow previously undertaken.

History.
I.C., § 30-932, as added by 2005, ch. 236, § 2, p. 717.

30-933. Status of preexisting escrows. — Nothing contained in this chapter shall be so construed as to impair or affect the obligation of any escrow agreement that was lawfully entered into prior to the effective date of this act.

History.
I.C., § 30-933, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Compiler's Notes.
The phrase "effective date of this act" in this section refers to the effective date of S.L. 2005, ch. 236, which was July 1, 2005.

30-934. Severability. — The provisions of this act are hereby declared to be severable, and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

History.
I.C., § 30-934, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Compiler's Notes.
The term "this act", referred to in this section, means S.L. 2005, chapter 236, which is codified as §§ 30-901 to 30-934 and 45-1504.

30-935. Initial licensing and compliance. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
This section, which comprised I.C., § 30-935, as added by 2005, ch. 236, § 2, p. 717, was repealed by S.L. 2008, ch. 311, § 4.

CHAPTER 10

GENERAL NONPROFIT CORPORATIONS

30-1001. Nonprofit corporations authorized. [Repealed.]

STATUTORY NOTES

Prior Laws.
A former § 30-1000, which comprised S.L. 1913, ch. 54, § 1, p. 164; reen. C.L. 214:1; C.S., § 4865; I.C.A., § 29-100,1 was repealed by S.L. 1978, ch. 308, § 14.

Compiler's Notes.
This section, which was compiled from I.C., § 30-1001 as added by 1978, ch. 308, § 15, was repealed by S.L. 1979, ch. 159, § 1.

30-1002, 30-1003. Application of corporation law — Membership. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised S.L. 1913, ch. 54, §§ 2, 3, p. 164; C.L., §§ 214:2, 214:3; C.S., §§ 4866, 4867; I.C.A., §§ 29-1002, 29-1003; am. 1977, ch. 252, § 13, p. 738; am. 1978, ch. 308, §§ 16, 17, p. 771, were repealed by S.L. 1979, ch. 159, § 1.

30-1004. Organization — Shares of stock or membership certificates. [Repealed.]

STATUTORY NOTES

Prior Laws.
A former § 30-1004, which comprised 1913, ch. 54, § 4, p. 164; reen. C.L., 214:4; C.S., § 4868; I.C.A., § 29-1004, was repealed by S.L. 1977, ch. 252, § 14.

Compiler's Notes.
This section, which comprised I.C., § 30-1004 as added by 1977, ch. 252, § 15, p. 738; am. 1978, ch. 308, § 18, 771, was repealed by S.L. 1979, ch. 159, § 1.

30-1005, 30-1006. Bylaws — Amendment, alteration. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised S.L. 1913, ch. 54, §§ 5, 6, p. 164; reen. C.L. § 214:5; C.S., § 4869; I.C.A., § 29-1005; I.C. § 30-1006 as added by 1951, ch. 51, § 1, p. 74; am. 1978, ch. 308, §§ 19, 20, p. 771, were repealed by S.L. 1979, ch. 159, § 1.

CHAPTER 11

RELIGIOUS, SOCIAL, AND BENEVOLENT ASSOCIATIONS

30-1101 — 30-1110. Formation, articles, bylaws, etc. of religious, social and benevolent associations. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised R.S. §§ 2760 to 2763, 2765, 2766; R.C. §§ 3011 to 3014, 3016, 3017; S.L. 1911, ch. 74, §§ 1, 2, p. 227; 1911, ch. 164, § 1, p. 561; 1911, ch. 165, §§ 1, 2, p. 562; S.L. 1913, ch. 40, §§ 1, 2, p. 143; C.L. §§ 3011 to 3014, 3016 to 3017a; S.L. 1919, ch. 131, p. 426; C.S. §§ 4870 to 4878; S.L. 1921, ch. 257, § 1, p. 570; am. 1925, ch. 196, §§ 1, 2, p. 364; am. 1929, ch. 57, § 1, p. 83; am. 1929, ch. 129, § 1, p. 211; I.C.A., §§ 29-1101 to 29-1109; am. 1939, ch. 49, § 1, p. 90; am. 1943, ch. 8, § 1, p. 10; am. 1945, ch. 6, § 1, p. 8; am. 1957, ch. 52, § 1, p. 89, were repealed by S.L. 1979, ch. 159, § 1.

CHAPTER 12

CORPORATIONS SOLE

30-1201 — 30-1209. Articles, powers, etc. of corporations sole. [Repealed.]

STATUTORY NOTES

Compiler's Notes.
These sections, which comprised S.L. 1895, §§ 1 to 7; reen. 1899, §§ 1 to 9; S.L. 1903, §§ 1 to 5; reen. R.C. & C.L. §§ 3018 to 3026; C.S. §§ 4879 to 4887; I.C.A. §§ 29-1201 to 29-1209, were repealed by S.L. 1979, ch. 159, § 1.

CHAPTER 13

PROFESSIONAL SERVICE CORPORATIONS

30-1301. Intent of legislature. — It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same or allied professional services to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

History.
1963, ch. 282, § 1, p. 725; am. 1979, ch. 108, § 1, p. 343.

30-1302. Short title. — This act may be cited as the "Professional Service Corporation Act."

History.
1963, ch. 282, § 2, p. 725.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1303. Definitions. — As used in this act:

(1) The term "professional service" shall mean any type of service to the public which can be rendered by a member of any profession within the purview of his profession. For the purpose of this chapter, the professions shall be held to include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying, and veterinary medicine, and no others. This chapter shall not be held to preclude incorporation as provided by section 54-1235, Idaho Code.

(2) The term "professional corporation" means a corporation organized under this act for the sole and specific purpose of rendering professional service and which has as its shareholders only natural persons who themselves are duly licensed or otherwise legally authorized within the state of Idaho to render one or more of the same professional services as the corporation.

(3) The term "allied professional services" shall mean professional services which are so related in substance that they are frequently offered in conjunction with one another as parts of the same service package to the consumer.

History.
1963, ch. 282, § 3, p. 725; am. 1979, ch. 108, § 2, p. 343; am. 1979, ch. 176, § 2, p. 526; am. 1982, ch. 233, § 5, p. 614; am. 1989, ch. 20, § 1, p. 23.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

Effective Dates.

Section 2 of S.L. 1989, ch. 20 declared an emergency. Approved March 8, 1989.

JUDICIAL DECISIONS

Analysis

Intent.
Real estate agents.

Intent.

This chapter clearly contemplates relationships with the corporation outside that of employer-employee, e.g., officer or agent. King v. State, Dep't of Emp., 110 Idaho 312, 715 P.2d 982 (1986).

Real Estate Agents.

Including real estate agents as rendering professional services would be inconsistent with the legislative intent in establishing a definition of professional services where a real estate agent only had to have a high school equivalent degree and pass a 90-hour classroom or correspondence course, and in order for a service to be professional, it had to be comparable to those occupations listed in terms of specialized higher education. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

30-1304. Who may incorporate. — An individual or group of individuals duly licensed or otherwise legally authorized to render the same or allied professional services within this state may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of the business corporation act of the state of Idaho (chapter 1 of title 30 of the Idaho Code) for the sole and specific purpose of rendering the same and specific professional service or allied professional services. This section shall not be deemed to authorize the incorporation of allied professional services where the laws of this state pertaining to specific professions or the codes of ethics or professional responsibility of any of the professions involved in such a proposed corporation prohibit such a combination of professional services.

History.

1963, ch. 282, § 4, p. 725; am. 1979, ch. 108, § 3, p. 343.

JUDICIAL DECISIONS

Cited in: Stephen v. Sallaz & Gatewood, Chtd., 150 Idaho 521, 248 P.3d 1256 (2011).

30-1305. Rendition of professional services. — No corporation organized and incorporated under this act may render professional services except through its officers, employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. The term "employee" as used in this act does not include clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering

professional services to the public for which a license or other legal authorization is required.

History.
1963, ch. 282, § 5, p. 725.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1306. Professional relationship unaffected — Personal and corporate liability. — Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

The relationship of an individual to a professional corporation organized under this act, with which such individual is associated, whether as shareholder, director, officer or employee, shall in no way modify or diminish the jurisdiction over him of the governmental authority or state agency which licensed, certified or registered him for a particular profession.

History.
1963, ch. 282, § 6, p. 725.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

JUDICIAL DECISIONS

Cited in: Swanson & Setzke v. Henning, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989); Stephen v. Sallaz & Gatewood, Chtd., 150 Idaho 521, 248 P.3d 1256 (2011).

30-1307. Type of business limited — Investments. — No corporation organized under this act shall engage in any business other than the rendering of the professional services for which it was specifically incorporated; provided, however, nothing in this act or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such

corporation from investing its funds in real estate, mortgages, stocks, bonds or any other type of investments, or from owning real or personal property necessary for the rendering of professional services.

History.

1963, ch. 282, § 7, p. 725.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1308. Shareholder qualifications — Voting. — No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than a person who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated. No shareholder of a corporation organized under this act shall enter into a voting trust agreement or any other type agreement vesting another person with the authority to exercise the voting power of any or all of his stock.

History.

1963, ch. 282, § 8, p. 725; am. 1981, ch. 226, § 7, p. 443.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1309. Disqualification to render professional service — Severance of relationship with corporation — Effect of violation. — If any officer, shareholder, agent or employee of a corporation organized under this act who has been rendering professional service to the public becomes legally disqualified to render such professional services within this state or accepts employment that, pursuant to existing law, places restrictions or limitations upon his continued rendering of such professional services, he shall sever all employment with, and financial interests in, such corporation forthwith. A corporation's failure to require compliance with this provision shall constitute a ground for forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the office of the secretary of state, the secretary of state forthwith shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

History.

1963, ch. 282, § 9, p. 725; am. 1978, ch. 308, § 21, p. 771.

STATUTORY NOTES

Cross References.
Attorney general, § 67-1401 et seq.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1309A. Death or disqualification of sole shareholder. — If a corporation organized under this chapter has only one (1) shareholder, and that shareholder becomes disqualified under section 30-1309, Idaho Code, or dies, the disqualified shareholder or the personal representative of the deceased shareholder may, notwithstanding other provisions of this chapter, exercise the voting rights of the outstanding shares only for the purpose of dissolving the corporation pursuant to sections 30-1-1401 through 30-1-1440, Idaho Code, consolidating or merging the corporation pursuant to section 30-1312, Idaho Code, or converting the corporation to a corporation for profit under the Idaho entity transactions act, chapter 18, title 30, Idaho Code, or, if excluded by said act pursuant to section 30-18-110, Idaho Code, under the Idaho business corporation act, chapter 1, title 30, Idaho Code.

History.
I.C., § 30-1309A, as added by 1979, ch. 108, § 4, p. 343; am. 1987, ch. 191, § 1, p. 389; am. 2003, ch. 62, § 1, p. 209; am. 2007, ch. 116, § 6, p. 333.

STATUTORY NOTES

Amendments.
The 2007 amendment, by ch. 116, inserted "under the Idaho entity transactions act, chapter 18, title 30, Idaho Code, or, if excluded by said act pursuant to section 30-18-110, Idaho Code" near the end.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-1310. Limitation on transfer of shares. — No shareholder of a corporation organized under this act may sell or transfer his shares in such corporation except to another individual who is eligible to be a shareholder of such corporation, and such sale or transfer may be made only after the same shall have been approved, at a stockholders' meeting specially called for such purpose, by such proportion, not less than a majority, of the outstanding stock as may be provided in the certificate of incorporation or in the by-laws. At such shareholders' meeting the shares of stock held by the shareholder proposing to sell or transfer his shares may not be voted or counted for any purpose, unless all stockholders consent that such stock be voted. The articles of incorporation may provide specifically for additional restraints on the alienation of shares and may require the redemption or purchase of such shares by the corporation at prices and in a manner specifically set forth in such articles or the articles may specifically authorize the corporation's board of directors or its shareholders to adopt by-laws restraining the alienation of shares and providing for the purchase or redemption by the corporation of its shares; provided, however, such provisions dealing with the purchase or redemption by the corporation of its

shares may not be invoked at a time or in a manner that would impair the capital of the corporation.

History.
1963, ch. 282, § 10, p. 725.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1311. Corporate name. — The corporate name shall end with "chartered," "professional association" or "professional corporation," or the abbreviation "P.A.," "P.C." or "CHTD," but the name need not contain the word "company," "corporation" or "incorporated" or any abbreviation of any such word.

History.
1963, ch. 282, § 11, p. 725; am. 1965, ch. 102, § 1, p. 188; am. 1978, ch. 308, § 22, p. 771; am. 1995, ch. 126, § 16, p. 542.

30-1312. Application of corporation laws — Merger. — (1) Subsection (2) of this section applies only to mergers of professional corporations excluded from the Idaho entity transactions act by section 30-18-110, Idaho Code.

(2) The business corporation act of the state of Idaho shall be applicable to a corporation organized pursuant to this act except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions thereof, and in such event the provisions of this act shall take precedence with respect to a corporation organized pursuant to the provisions of this act. A professional corporation organized under this act shall consolidate or merge only with another professional corporation organized to render the same specific professional service or allied professional services.

History.
1963, ch. 282, § 12, p. 725; am. 1979, ch. 108, § 5, p. 343; am. 2007, ch. 116, § 7, p. 333.

STATUTORY NOTES

Cross References.
Business corporation act, chapter 1, title 30, Idaho Code.

Amendments.
The 2007 amendment, by ch. 116, added subsection (1) and designated the existing provisions of the section as subsection (2).

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-1313. Laws regulating professions unaffected. — The provisions of this act shall not be considered as repealing, modifying or restricting the

applicable provisions of law regulating the several professions except insofar as such laws conflict with the provisions of this act.

History.
1963, ch. 282, § 13, p. 725.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 1963, ch. 282, which is presently compiled as §§ 30-1301 to 30-1309 and 30-1310 to 30-1313. The reference probably should be to "this chapter," being chapter 13, title 30, Idaho Code.

30-1314. Admission of foreign corporations — Revocation of certificate of authority. — (a) A professional corporation organized under the laws of another jurisdiction may obtain a certificate of authority to do business in this state only if all the officers, employees, or agents who render the corporation's services in this state are licensed under the laws of Idaho to render such services.

(b) If it be determined by the appropriate professional licensing body of this state that an unlicensed officer, employee or agent of an admitted foreign professional corporation is rendering or has rendered professional services in this state in the course of his relationship with the corporation, the licensing body shall certify that fact to the secretary of state. The secretary of state shall upon receipt of such certification revoke the corporation's certificate of authority in accordance with section 30-1-122, Idaho Code.

History.
I.C., § 30-1314, as added by 1979, ch. 108, § 6, p. 343.

STATUTORY NOTES

Prior Laws.
Former § 30-1314, which comprised S.L. 1963, ch. 282, § 14, was repealed by S.L. 1978, ch. 308, § 23.

Compiler's Notes.
The version of § 30-1-122 that is referenced near the end of subsection (b) was repealed by S.L. 1997, ch. 366, § 1, effective July 1, 1997. The reference probably should now be to § 30-1-1531.

30-1315. Officers, directors and shareholders. — (a) Except as provided in section 30-1309A, Idaho Code, no person who is not licensed or otherwise legally authorized to practice the profession or one of the professions for the practice of which a professional corporation is organized may be a shareholder in the corporation.

(b) No person who is not a shareholder may serve as a director of a professional corporation.

(c) Except as provided in subsection (d), no person who is not a shareholder may serve as a general officer of a professional corporation. The offices of president and secretary shall not be filled by the same person.

(d) A professional corporation which has only one (1) shareholder shall

have a nonshareholder as the secretary. All other general offices shall be held by the shareholder.

History.
I.C., § 30-1315, as added by 1981, ch. 226, § 9, p. 443.

STATUTORY NOTES

Prior Laws.
Former § 30-1315, which comprised I.C., § 30-1315, as added by 1970, ch. 1, § 1, p. 3, was repealed by S.L. 1981, ch. 226, § 8.

CHAPTER 14

UNIFORM SECURITIES ACT (2004)

Part 1. General Provisions

30-14-101. Short title. — This chapter shall be known and may be cited as the "Uniform Securities Act (2004)."

History.
I.C., § 30-14-101, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
This revision of chapter 14 of title 30 was enacted by § 2 of S.L. 2004, ch. 45, effective September 1, 2004. The previous version of chapter 14 of title 30, as enacted in 1967 and amended through 2003 and comprising §§ 30-1401 to 30-1462, was repealed by § 1 of S.L. 2004, ch. 45, effective September 1, 2004, or by an earlier act.

JUDICIAL DECISIONS

Analysis

Attorney's fees.
Purpose and validity.

Attorney's Fees.
In investors' action against their brokers for securities violations where they received an arbitration award, the trial court correctly ruled the investors were not entitled to pursue fees in the award confirmation proceedings, as there was no independent cause of action for attorney's fees. Barbee v. WMA Securities, Inc., 143 Idaho 391, 146 P.3d 657 (2006).

Purpose and Validity.
State law regulating the sale of securities is not merely a revenue measure, but its real purpose is to protect public from unsubstantial securities. Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925); McKinlay v. Javan Mines Co., 42 Idaho 770, 248 P. 473 (1926).

Passage of provisions of an act regulating the sale of securities is within the police power of the state. Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925).

30-14-102. Definitions. — In this chapter, unless the context otherwise requires:

(1) "Administrator" means the director of the Idaho department of finance or his designee.

(2) "Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or who represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer, or director of

a broker-dealer or issuer, or an individual having a similar status or performing similar functions, is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by a rule adopted or an order issued under this chapter.

(3) "Bank" means:

(a) A banking institution organized under the laws of the United States;

(b) A member bank of the federal reserve system;

(c) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the comptroller of the currency pursuant to section 1 of public law 87-722 (12 U.S.C. 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this chapter; and

(d) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (a), (b) or (c) of this subsection.

(4) "Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(a) An agent;

(b) An issuer;

(c) A bank, a trust company organized or chartered under the laws of this state, or a savings institution if its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi), (viii) through (x), and (xi) if limited to unsolicited transactions; 3(a)(5)(B); and 3(a)(5)(C) of the securities exchange act of 1934 (15 U.S.C. 78c(a)(4) and (5)) or a bank that satisfies the conditions described in subsection 3(a)(4)(E) of the securities exchange act of 1934 (15 U.S.C. 78c(a)(4));

(d) An international banking institution; or

(e) A person excluded by a rule adopted or an order issued under this chapter.

(5) "Depository institution" means:

(a) A bank; or

(b) A savings institution, trust company, credit union or similar institution that is organized or chartered under the laws of a state or of the United States that is authorized to receive deposits, and that is supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund, or a successor authorized by federal law. The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A morris plan bank; or

(iii) An industrial loan company.

(6) "Federal covered investment adviser" means a person registered under the investment advisers act of 1940, as cited in section 30-14-103, Idaho Code.

(7) "Federal covered security" means a security that is, or upon completion of a transaction will be, a covered security under section 18(b) of the securities act of 1933 (15 U.S.C. 77r(b)) or rules or regulations adopted pursuant to that provision.

(8) "Filing" means the receipt under this chapter of a record by the administrator or a designee of the administrator.

(9) "Fraud," "deceit," and "defraud" are not limited to common law deceit.

(10) "Guaranteed" means guaranteed as to payment of all principal and all interest.

(11) "Institutional investor" means any of the following, whether acting for itself or for others in a fiduciary capacity:

(a) A depository institution, a trust company organized or chartered under the laws of this state, or an international banking institution;

(b) An insurance company;

(c) A separate account of an insurance company;

(d) An investment company as defined in the investment company act of 1940, as cited in section 30-14-103, Idaho Code;

(e) A broker-dealer registered under the securities exchange act of 1934, as cited in section 30-14-103, Idaho Code;

(f) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars ($10,000,000) or its investment decisions are made by a named fiduciary, as defined in the employee retirement income security act of 1974, that is a broker-dealer registered under the securities exchange act of 1934, an investment adviser registered or exempt from registration under the investment advisers act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(g) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars ($10,000,000) or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the employee retirement income security act of 1974, that is a broker-dealer registered under the securities exchange act of 1934, an investment adviser registered or exempt from registration under the investment advisers act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(h) A trust, if it has total assets in excess of ten million dollars ($10,000,000), its trustee is a depository institution, and its participants are exclusively plans of the types identified in paragraph (f) or (g) of this subsection, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(i) An organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), a corporation, a Massachusetts trust or similar business trust, a limited liability company, or a partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars ($10,000,000);

(j) A small business investment company licensed by the small business administration under section 301(c) of the small business investment act of 1958 (15 U.S.C. 681(c)) with total assets in excess of ten million dollars ($10,000,000);

(k) A private business development company as defined in section 202(a)(22) of the investment advisers act of 1940 (15 U.S.C. 80b-2(a)(22)) with total assets in excess of ten million dollars ($10,000,000);

(*l*) A federal covered investment adviser acting for its own account;

(m) A "qualified institutional buyer" as defined in rule 144A(a)(1), other than rule 144A(a)(1)(i)(H), adopted under the securities act of 1933 (17 CFR 230.144A);

(n) A "major U.S. institutional investor" as defined in rule 15a-6(b)(4)(i) adopted under the securities exchange act of 1934 (17 CFR 240.15a-6);

(o) Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars ($10,000,000) not organized for the specific purpose of evading this chapter; or

(p) Any other person specified by a rule adopted or an order issued under this chapter.

(12) "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

(13) "Insured" means insured as to payment of all principal and all interest.

(14) "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the securities act of 1933.

(15) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(a) An investment adviser representative;

(b) A lawyer, accountant, engineer or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(c) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(d) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(e) A federal covered investment adviser;

(f) A bank, a trust company organized or chartered under the laws of this state, or a savings institution;

(g) Any other person that is excluded by the investment advisers act of 1940 from the definition of investment adviser;

(h) Any person who offers accountancy services to the public and who holds a valid, unrevoked and unsuspended license under the provisions of chapter 2, title 54, Idaho Code, designating said person as a certified public accountant or a licensed public accountant; or

(i) Any other person excluded by a rule adopted or an order issued under this chapter.

(16) "Investment adviser representative" means an individual employed by or associated with an investment adviser or federal covered investment adviser who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(a) Performs only clerical or ministerial acts;

(b) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(c) Is employed by or associated with a federal covered investment adviser, unless the individual has a "place of business" in this state as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. 80b-3a) and is:

(i) An "investment adviser representative" as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. 80b-3a); or

(ii) Not a "supervised person" as that term is defined in section 202(a)(25) of the investment advisers act of 1940 (15 U.S.C. 80b-2(a)(25)); or

(d) Is excluded by a rule adopted or an order issued under this chapter.

(17) "Issuer" means a person that issues or proposes to issue a security, subject to the following:

(a) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued.

(b) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate.

(c) The issuer of a fractional undivided interest in an oil, gas or other mineral lease or in payments out of production under a lease, right or

royalty is the owner of an interest in the lease or in payments out of production under a lease, right or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale.

(18) "Nonissuer transaction" or "nonissuer distribution" means a transaction or distribution not directly or indirectly for the benefit of the issuer.

(19) "Offer to purchase" includes an attempt or offer to obtain, or solicitation of an offer to sell, a security or interest in a security for value. The term does not include a tender offer that is subject to section 14(d) of the securities exchange act of 1934 (15 U.S.C. 78n(d)).

(20) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(21) "Place of business" of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(a) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(b) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients.

(22) "Predecessor act" means the act repealed by section 30-14-702, Idaho Code.

(23) "Price amendment" means the amendment to a registration statement filed under the securities act of 1933 or, if an amendment is not filed, the prospectus or prospectus supplement filed under the securities act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(24) "Principal place of business" of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners or managers of the broker-dealer or investment adviser direct, control and coordinate the activities of the broker-dealer or investment adviser.

(25) "Record," except in the phrases "of record," "official record," and "public record," means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) "Sale" includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value. "Offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. Both "sale" and "offer to sell" include:

(a) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

(b) A gift of assessable stock involving an offer and sale; and

(c) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security.

(27) "Securities and exchange commission" means the United States securities and exchange commission.

(28) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas or other mineral rights; put, call, straddle, option or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security":

(a) Includes both a certificated and an uncertificated security;

(b) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or other specified period;

(c) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974;

(d) Includes as an "investment contract" an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. "Common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(e) Includes as an "investment contract," among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement, life settlement or senior settlement or similar agreement.

(29) "Self-regulatory organization" means a national securities exchange registered under the securities exchange act of 1934, a national securities association of broker-dealers registered under the securities exchange act of 1934, a clearing agency registered under the securities exchange act of 1934, or the municipal securities rulemaking board established under the securities exchange act of 1934.

(30) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach or logically associate with the record an electronic symbol, sound or process.

(31) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

History.

I.C., § 30-14-102, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 1, p. 171.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Director of department of insurance, § 41-202.

Amendments.

The 2012 amendment, by ch. 65, substituted "subsections (3)(a)(4)(B)((i) through (vi)" for "subsections (3)(a)((4)(b)(i) through (vi)" in paragraph (4)(c).

Federal References.

The references, in subsection (4)(c), to "subsections 3(a)(4)(B)(i) through (vi), (viii) through (x), and (xi)" and "3(a)(5)(B)" and "3(a)(5)(C)" are all to 15 USCS § 78c (a)(4) and (a)(5) in the securities exchange act of 1934, which section was enacted by § 3 of chapter 404 of an act of June 6, 1934.

The investment advisers act of 1940, referred to in this section, is codified as 15 USCS § 80b-1 et seq.

The investment company act of 1940, referred to in this section, is codified as 15 USCS § 80a-1 et seq.

The securities exchange act of 1934, referred to in this section, is codified as 15 USCS § 78a et seq.

The employee retirement income security act of 1974, referred to in this section, is codified as 29 USCS § 1001 et seq.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler's Notes.

For more on the federal deposit insurance corporation, see *http://www.fdic.gov.*

For national credit union share insurance fund, see *http://www.ncua.gov/about/SIF/Pages/default.aspx.*

For more on morris plan banks, see *http://american-business.org/2612-morris-plan-banks.html.*

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Analysis

Investment adviser.
Loan.
Negotiate for the sale.
Security.

Investment Adviser.

To the extent that the definition contained in an administrative rule from the department of finance, with regard to an investment adviser transacting business, conflicts with the statutory definition in subsection (6) of this section, this section governs. Kinsela v. State, Dep't of Fin., 117 Idaho 632, 790 P.2d 1388 (1990).

Loan.

Transactions between purported creditors and debtor were intended by parties to be loans not investments, because it did not appear that creditors could expect capital appreciation or participation in earnings generated by debtor. They expected to receive interest payments of 16% per annum, along with repayment of their principal after three years. In re Gables Mgmt., LLC, 473 B.R. 352 (Bankr. D. Idaho 2012).

Negotiate for the sale.

"Negotiate for the sale" of stock in violation of former § 26-1801 included all steps leading up to the sale. Intermountain Title Guar. Co. v. Egbert, 52 Idaho 402, 16 P.2d 390 (1932) (See now subsection (16) of this section).

Security.

Solicitation of fees from customers to enter their names in a bureau of land management lottery for gas and oil leases did not constitute marketing an investment security under Idaho law. The economic realities of the transactions did not amount to investing. State, Dep't of Fin. v. Resource Serv. Co., 130 Idaho 877, 950 P.2d 249 (1997).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 401; RUSA 101.

1. Under Section 605(a) the administrator has the power to define by rule any term, whether or not used in this Act, as long as the definitions are not inconsistent with the Act.

2. All definitions include corresponding meanings. For example, "filing" would include "file" or "filed"; "sale" would include "sell."

3. Prefatory Phrase: "In this [Act], unless the context otherwise requires": Prior Provisions: 1956 Act Section 401 Preface; RUSA Section 101 Preface. This prefatory phrase which is in the counterpart provisions of the federal securities statutes, see, e.g., Securities Act of 1933 Section 2(a), provides the basis for the courts to take into account the statutory and factual context of each definition, see, e.g., *Reves v. Ernst & Young*, 494 U.S. 56 (1990); 2 Louis Loss & Joel Seligman, Securities Regulation 927-929 (3d ed. rev. 1999), and will allow the courts to harmonize this Act's definitions with the counterpart federal securities definitions to the extent appropriate. Cf. *Akin v. Q-L Inv., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992) ("Texas courts generally look to decisions of the federal courts to interpret the Texas Securities Act because of obvious similarities between the state and federal laws"); *Koch v Koch Indus., Inc.*, 203 F.3d 1202, 1235 (10th Cir. 2000) (following federal definition of materiality); *Biales v. Young*, 432 S.E.2d 482, 484 (S.C. 1993) ("Section 35-1-1490(2) is substantially similar to Section 12(1) of the Federal Securities Act").

4. Section 102(2): Agent: Prior Provisions: 1956 Act Section 401(b); RUSA Section 101(14). Section (102)(2), in part, follows the 1956 Act definition. The 1956 Act used the term "agent" while the RUSA Section 101(14) used the term "sales representative." Given the broader enactment of the 1956 Act, this Act also uses the term "agent." Certain exclusions from the 1956 Act are exemptions in this Act. See Section 402(b).

Whether a particular individual who represents a broker-dealer or issuer is an "agent" depends upon much the same factors that create an agency relationship at common law. See, e.g., *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 179 (Minn. Ct. App. 1986) (following Official Comment that establishing agency under the Uniform Securities Act "depends upon much the same factors which create an agency relationship at common law"); *Shaughnessy & Co., Inc. v. Commissioner of Sec.*, 1971-1978 Blue Sky L. Rep. (CCH) ¶71,348 (Wis. Cir. Ct. 1977) (unlicensed person who took information relevant to securities transactions and turned it over to securities agents was himself an agent).

An individual can be an agent for a broker-dealer or issuer for a purpose other than effecting or attempting to effect purchases or sales of securities and not be a statutory agent under this Act. See, e.g., *Baker, Watts & Co. v. Miles & Stockridge*, 620 A.2d 356, 367 (Md. Ct. App. 1993) (attorney-client relationship is generally one of agency, but that alone does not bring an attorney within securities act definition of agent). An individual will not be an agent under Section 102(2) because of the person's status as a partner, officer, or director of a broker-dealer or issuer if such an individual does not effect or attempt to effect purchases or sales of securities. See, e.g., *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988).

Section 102(2) is intended to include any individual who acts as an agent, whether or not the individual is an employee or independent contractor. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. *en banc* 1990), *cert. denied,* 499 U.S. 976 (1991).

The word "individual" in the definition of the term "agent" is limited to human beings and does not include a juridical "person" such as a corporation. Cf. definition of "person" in Section 102(20). The 1956 Act Section 401(b) similarly was limited to individuals and did not include juridical persons. See, e.g., *Connecticut Nat'l Bank v. Giacomi*, 699 A.2d 101, 111-112 (Conn. 1997) ("agent" only includes natural persons when it used the term individual); *Schpok v. Fodale*, 236 N.W.2d 97, 99 (Mich. Ct. App. 1975) (agent defined to be individual and did not include a corporation).

An individual whose acts are solely clerical or ministerial would not be an agent under Section 102(2). Cf. Section 402(b)(8). Ministerial or clerical acts might include preparing written communications or responding to inquiries.

5. Section 102(3): Bank: Prior Provision: Subsection 3(a)(6) of the Securities Exchange Act of 1934. A United States branch of a foreign bank that otherwise satisfies this definition would be a bank.

6. Section 102(4): Broker-Dealer: Prior Provisions: 1956 Act Section 401(c); RUSA Section 101(2). This definition generally follows the definition of broker-dealer in the 1956 Act and RUSA. The use of the compound term is meant to include either a broker or a dealer. The recognized distinction is that a broker acts for the benefit of another while a dealer acts for itself in buying for or selling securities from its own inventory.

The distinction between "a person engaged in the business of effecting transactions in securities" and an investor, who may buy and sell with some frequency and is outside the scope of this term, has been well developed in

the case law. See 6 Louis Loss & Joel Seligman, Securities Regulation 2980-2984 (3d ed. 1990).

The 1956 Act Section 401(c) excluded from the definition of broker-dealer a person who during any 12 consecutive months did not direct more than 15 offers to buy or sell in this State. In this Act exemptions from broker-dealer registration are provided in Section 401(b).

The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the blanket exemption of banks from the definition of broker and dealer in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934. The Gramm-Leach-Bliley Act permits a bank to avoid registration as a broker or dealer at the federal level if the bank limits its activities to those specified in the Securities Exchange Act. This Act generally adopts the activity focused exceptions for banks included in the Gramm-Leach-Bliley Act, with minor modifications relating to the private placement and *de minimis* brokerage activities of banks (15 U.S.C. 78c(a)(4)(B)(vii) and (xi)). This Act also reaches savings institutions.

A state may decide to adopt an exclusion in Section 102(4)(C) that fully conforms with the bank exceptions contained in the Gramm-Leach-Bliley Act. For states that choose this approach, the language of Section 102(4)(C) should read:

(C) a bank or savings institution if its activities as broker-dealer are limited to those specified in Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

Section 102(4)(E) of this Act also permits a securities administrator to adopt additional exclusions that exclude banks and other depository institutions, in whole or in part, from the definition of "broker-dealer."

States that promptly adopt this Act should consider whether it is appropriate to provide banks a transition period to comply with the Act's new activity focused exceptions. The activity focused exceptions for banks in the Gramm-Leach-Bliley Act were originally to become effective at the federal level on May 12, 2001. However, the Securities and Exchange Commission has delayed the effective date of these activity focused exceptions and thus continued the blanket exemption for banks beyond May 12, 2001, and commenced a rulemaking designed to clarify and define the scope of the bank exceptions in the Gramm-Leach-Bliley Act. See Sec. Ex. Act Rels. 44,291, 74 SEC Dock. 2155 (2001) (proposal); 45,897, 77 SEC Dock. 1555 (2002) (proposal). To avoid disrupting the activities of banks, states should consider delaying implementation of the activity focused exceptions in this Act until these exceptions are implemented at the federal level.

Section 15(h)(1) of the Securities Exchange Act of 1934, as amended by the National Securities Markets Improvement Act of 1996, preempts state law from "[establishing] capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to the requirements in those areas established under [the Securities Exchange Act]." These preemptions are recognized in the substantive broker-dealer provisions in Article 4.

7. Section 102(5): Depository institution: No Prior Provision. A depository institution's securities are addressed by the exemption in Section 201(3). A depository institution is an institutional investor in Section 102(11)(A).

8. Section 102(6): Federal covered investment adviser: No Prior Provision. This provision is necessitated by Section 203A of the Investment Advisers Act of 1940, added by Title III of the National Securities Markets Improvement Act of 1996, which allocates to primary state regulation most advisers with assets under management of less than $25 million. SEC registration is permitted, but not required, for investment advisers having between $25 and $30 million of assets under management and is required of investment advisers having at least $30 million of assets under management. Investment Advisers Act of 1940 Rule 203A-1. Most advisers with assets under management of $25 million or more register solely under Section 203 of the Investment Advisers Act of 1940 and not state law. This division of labor is intended to eliminate duplicative regulation of investment advisers.

9. Section 102(7): Federal covered security: No Prior Provision. The National Securities Markets Improvement Act of 1996, as subsequently amended, partially preempted state law in the securities offering and reporting areas. Under Section 18(a) of the Securities Act of 1933, no state statute, rule, order, or other administrative action may apply to:

(1) The registration of a "covered" security or a security that will be a covered security upon completion of the transaction;

(2)(A) any offering document prepared by or on behalf of the issuer of a covered security;

(2)(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or its issuer that is required to be filed with the SEC or any national securities association registered under Section 15A of the Securities Exchange

Act such as the National Association of Securities Dealers (NASD); or

(3) the merits of a covered security or a security that will be a covered security upon completion of the transaction.

Section 18(b) of the Securities Act of 1933 applies to four types of "covered securities":

(1) Securities listed or authorized for listing on the New York Stock Exchange (NYSE), the American Stock Exchange (Amex); the National Market System of the Nasdaq stock market; or securities exchanges registered with the Securities and Exchange Commission (SEC) (or any tier or segment of their trading) if the SEC determines by rule that their listing standards are substantially similar to those of the NYSE, Amex, or Nasdaq National Market System, which the SEC has done through Rule 146; and any security of the same issuer that is equal in seniority or senior to any security listed on the NYSE, Amex, or Nasdaq National Market System;

(2) securities issued by an investment company registered with the SEC (or one that has filed a registration statement under the Investment Company Act of 1940);

(3) securities offered or sold to "qualified purchasers." This category of covered securities will become operational when the SEC defines the term "qualified purchaser" as used in Section 18(b)(3) of the Securities Act of 1933, by rule. To date the SEC has proposed, but not adopted, Rule 146(c) of the Securities Act of 1933; and

(4) securities issued under the following specified exemptions of the Securities Act of 1933:

(A) Sections 4(1) (transactions by persons other than an issuer, underwriter or dealer), and 4(3) (dealers after specified periods of time), but only if the issuer files reports with the Commission under Sections 13 or 15(d) of the Securities Exchange Act;

(B) Section 4(4) (unsolicited brokerage transactions);

(C) Securities Act exemptions in Section 3(a) with the exception of the charitable exemption in Section 3(a)(4), the exchange exemption in Section 3(a)(10), the intrastate exemption in Section 3(a)(11), and the municipal securities exemption in Section 3(a)(2) but only with "respect to the offer or sale of such [municipal] security in the State in which the issuer of such security is located"; and

(D) securities issued in compliance with SEC rules under Section 4(2) (private placements).

Section 18(c)(1) preserves state authority "to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."

The National Securities Markets Improvement Act, in essence, preempts aspects of the securities registration and reporting processes for specified federal covered securities. The Act does not diminish state authority to investigate and bring enforcement actions generally with respect to securities transactions.

The States are authorized to require filings of any document filed with the SEC for notice purposes "together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee." Section 18(c)(2). However, no filing or fee may be required with respect to any listed security that is a covered security under Section 18(b)(1) (traded on specified stock markets). Section 302 of this Act addresses notice filings and fees applicable to federal covered securities.

10. Section 102(8): Filing: Prior Provision: RUSA Section 101(4). The RUSA definition was revised to recognize that records may be filed in paper form or electronically with the administrator, or designees such as the Web-CRD (Central Registration Depository) or Investment Adviser Registration Depository (IARD) or the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or successor systems.

In the RUSA definition, the term "filed" referred to "actual delivery of a document or application." This Act substitutes the term "record" which is defined in Section 102(25) to refer broadly to "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perishable form". This definition requires the receipt of a record. The definition does not limit filing to any specific medium such as mail, certified mail, or a particular electronic system. The definition is intended to permit an administrator to accept filings over the Internet or through a direct modem system, both of which are now used to transmit documents to EDGAR, or through new electronic systems as they evolve.

"Receipt" refers to the actual delivery of a record to the administrator or a designee and does not refer to a subsequent examination of the record by the administrator. See, e.g., *Fehrman v. Blunt*, 825 S.W.2d 658 (Mo. Ct. App. 1992). If a deficient form was provided to a designee, but not provided to the administrator because of the deficiency, it would not be filed under this definition.

11. Section 102(9): Fraud, deceit and defraud: Prior Provisions: 1956 Act Section

401(d); RUSA Section 101(6). This definition, which is identical to the 1956 Act and RUSA, codifies the holdings that "fraud" as used in the federal and state securities statutes is not limited to common law deceit. See generally 7 Louis Loss & Joel Seligman, Securities Regulation 3421-3448 (3d ed. 1991).

12. Section 102(10): Guaranteed: Prior Provisions: 1956 Act Section 401(e); RUSA Section 401(a)(1). The 1956 Act definition of "guaranteed" applies generally to payment of "principal, interest, or dividends." The RUSA definition of "guaranteed," which was solely applicable to exempt securities, applied to the guarantee of "all or substantially all of principal and interest or dividends."

Section 102(10) follows the 1956 Act approach and applies generally to the guarantee of "all principal and all interest." Any method of guarantee that results in a guarantee of payment of all principal and all interest will suffice including, for example, an irrevocable letter of credit.

This definition does not address whether or not a guarantee, whether whole or partial, is itself a security. That issue is addressed by the definition of "security" in Section 102(28).

13. Section 102(11): Institutional investor: Prior Provisions: RUSA Section 101(5); Securities Act of 1933 Rules 144A and 501(a).

Sections 102(11)(A) through (K) are based on Rule 501(a) of the Securities Act of 1933, but do not include the paragraphs of Rule 501(a) that address individuals. Given the significant period of time since Rule 501(a) was adopted, this Act has used a $10 million minimum for several categories of institutional investor rather than $5 million minimum used in Rule 501(a).

Section 102(11)(H) concludes with an except clause meant to exclude self-directed plans for individuals from this definition.

With respect to the exclusion of Rule 144A(a)(1)(H) from Section 102(11)(M), the substance of Rule 144A(a)(1)(H) appears in Section 102(11)(I), but with a requirement of total assets in excess of $10,000,000.

Section 102(11)(O) is meant to reach persons similar to those listed in Sections 102(11)(A) through (N), but not otherwise listed. Under Section 503, if challenged in a proceeding, the burden of proving the availability of an exemption is on the person claiming it. An interpretive opinion may be sought from the administrator under Section 605(d).

14. Section 102(12): Insurance company: No Prior Provision. This definition is based on Securities Act of 1933 Section 2(a)(13).

15. Section 102(13): Insured: Prior Provision: RUSA Section 401(a)(2). The RUSA definition of "insured," which was solely applicable to exempt securities, applied to the insurance of "all or substantially all of principal, interest, or dividends." Section 102(13) is applicable generally but is limited to "payment of all principal and all interest."

16. Section 102(14): International banking institution: No Prior Provision. Securities issued or guaranteed by the International Bank for Reconstruction and Development, 22 U.S.C. Section 286k-1(a); the Inter-American Development Bank, 22 U.S.C. Section 283h(a); the Asian Development Bank, 22 U.S.C. Section 285h(a); the African Development Bank, 22 U.S.C. Section 290i-9; and the International Finance Corporation, see 22 U.S.C. Section 282k; are treated as exempt securities under Section 3(a)(2) of the Securities Act of 1933, see generally 3 Louis Loss & Joel Seligman, Securities Regulation 1191-1194 (3d ed. rev. 1999), and are within this term.

17. Section 102(15): Investment adviser: Prior Provisions: 1956 Act Section 401(f); RUSA Section 101(7). This term generally follows the definition in Section 202(a)(11) of the Investment Advisers Act of 1940, but has been updated to take into account new media such as the Internet.

The first sentence in Section 102(15) is identical to the first sentence in the 1956 Act Section 401(f) and the counterpart language in Section 202(a)(11). The RUSA definition deleted the phrases "either directly or through publications or writings" and "regular" before business. These terms have been returned to Section 102(15) because of the intention that this definition be construed uniformly with the definition in Section 202(a)(11) of the Investment Advisers Act of 1940. This first sentence would not reach the author of a book who did not receive compensation as part of a regular business for providing investment advice.

The second sentence in the term addressing financial planners is new. The purpose of this sentence is to achieve functional regulation of financial planners who satisfy the definition of investment adviser. Cf. Investment Advisers Act Release 1092, 39 SEC Dock. 494 (1987) (similar approach in Securities and Exchange Commission interpretative Release). This reference is not intended to preclude persons who hold a formally recognized financial planning or consulting designation or certification from using this designation. The use by a person of a title, designation or certification as a financial planner or other similar title, designation, or certification alone does not require registration as an investment adviser.

Sections 102(15)(A) through (H) are exclusions from the term "investment adviser." An excluded person can be held liable for fraud in providing investment advice, see Section 502, but would not be subject to the registration and regulatory provisions in Article 4.

Sections 102(15)(A) and (E) are new and recognize that investment adviser representatives and federal covered investment advisers are separately treated in this Act. See definitions in Sections 102(6) and 102(16); registration and exemptions in Sections 404-405.

Sections 102(15)(B), (C), and (G) are substantively identical to the 1956 Act, RUSA, and the Investment Advisers Act of 1940. The Official Comment to the 1956 Act Section 401(f) quoted an opinion of the Securities and Exchange Commission General Counsel in Investment Advisers Act Release 2 on the meaning of "special compensation" included in Section 102(15)(C):

> [This clause] amounts to a recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business, and that it would be inappropriate to bring them within the scope of the Investment Advisers Act merely because of this aspect of their business. On the other hand, that portion of clause [(C)] which refers to 'special compensation' amounts to an equally clear recognition that a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the Act merely because he is also engaged in effecting market transactions in securities.... The essential distinction to be borne in mind in considering borderline cases ... is the distinction between compensation for advice itself and compensation for services of another character to which advice is merely incidental.

Similarly, other broker-dealer employees such as research analysts who receive no special compensation from third parties for investment advice would not be required to register as investment advisers.

The 1956 Act definition added the word "paid" in Section 401(f)(4) to the counterpart exclusion in Section 202(a)(11) of the Investment Advisers Act "to emphasize," as the Official Comment explained, "that a person who periodically distributes a 'tipster sheet' free as a way to get paying clients is not excluded from the definition as a 'publisher.'"

After the 1956 Act was published, the United States Supreme Court construed the definition of investment adviser in *Lowe v. SEC*, 472 U.S. 181 (1985), and concluded:

> Congress did not intend to exclude publications that are distributed by investment advisers as a normal part of the business of servicing their clients. The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Id. at 185.

Responsive to this language RUSA rewrote this exclusion to provide:

> a publisher, employee, or columnist of a newspaper, news magazine, or business or financial publication, or an owner, operator, or employee of a cable, radio, or television network, station, or production facility, if, in either case, the financial or business news published or disseminated is made available to the general public and the content does not consist of rendering advice on the basis of the specific investment situation of each client.

Recent experience at the federal and state levels suggest that the 1956 Act and RUSA approaches may be too broad. The retention of the Investment Advisers Act approach provides a better balance between First Amendment concerns and protection of investors from non-"bona fide" publicizing of investment advice. The exclusion in Section 102(15)(D) is intended to exclude publishers of Internet or electronic media, but only if the Internet or electronic media publication or website satisfies the "bona fide" and "publication of general and regular circulation" requirements. Cf. *SEC v. Park*, 99 F. Supp. 2d 889, 895-896 (N.D. Ill. 2000) (court declined to dismiss complaint against an Internet website when there were allegations that the website was not "bona fide" or of "general and regular circulation").

The exclusion in Section 102(15)(G) is required by the National Securities Markets Improvement Act of 1996. This exclusion will reach banks and bank holding companies as described in Investment Advisers Act Section 202(a)(11)(A) and persons whose advice solely concerns United States government securities as described in Section 202(a)(11)(E).

18. Section 102(16): Investment adviser representative: No Prior Provision. Investment adviser representatives have not been required to register under the federal Investment Advisers Act, before or after the National Securities Markets Improvement Act.

The term investment adviser representative is not intended to preclude persons who hold a formally recognized financial planning or consulting title, designation, or certification from using such a designation. The use by a person of a title, designation or certification as a financial planner, or other similar title, designation, or certification alone does not require registration as an investment adviser representative.

19. Section 102(17): Issuer: Prior Provisions: 1956 Act Section 401(g); RUSA Section

101(8). This Section generally follows the 1956 Act and RUSA.

In paragraph (B), the phrase "or that is otherwise contractually responsible for assuring payment of the certificate" is intended to address forms of payment other than leases or conditional sales contracts. It would also reach guarantors.

20. Section 102(18): Nonissuer transaction or nonissuer distribution: Prior Provisions: 1956 Act Section 401(h); RUSA Section 101(9). This definition is relevant to several exempt transactions in Section 202.

In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320 (Utah Ct. App. 1987), the court declined to limit the term benefit to monetary benefits and instead held a spinoff transaction could provide direct or indirect benefits to an issuer. Id. at 323-324, *following SEC v. Datronics Eng'r, Inc., 490 F.2d 250 (4th Cir. 1973), cert. denied,* 416 U.S. 937; *SEC v. Harwin Indus. Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971). In a similar fashion, transactions by officers, directors, promoters, and other insiders of the issuer may benefit the issuer and may not qualify as nonissuer transactions.

21. Section 102(19): Offer to purchase: No Prior Provision. A rescission offer under Section 510 would be an offer to purchase with respect to a security that earlier had been sold.

22. Section 102(20): Person: Prior Provisions: 1956 Act Section 401(i); RUSA Section 101(10). This is the standard definition used by the National Conference of Commissioners for Uniform State Laws with the addition of "limited liability company" to reflect current usage. The use of the concluding phrase "or any other legal or commercial entity" is intended to be broad enough to include other forms of business entities that may be created or popularized in the future.

23. Section 102(21): Place of business: Prior Provision: Rules 203A-3(b) and 222-1 of the Investment Advisers Act of 1940.

24. Section 102(23): Price amendment: Prior Provision: RUSA Section 101(11). A price amendment may be used in a registration coordinated with the Securities and Exchange Commission procedure in Section 303(d). In the case of noncash offerings, required information concerning such matters as the offering price and underwriting arrangements is normally filed in a "price" amendment after the rest of the registration statement has been reviewed by the Securities and Exchange Commission staff. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 542-550 (3d ed. rev. 1998).

25. Section 102(24): Principal place of business: Prior Provision: Rule 222-1(b) of the Investment Advisers Act of 1940.

26. Section 102(25): Record: Prior Provision: Uniform Electronic Transactions Act Section 2(13). Cf. Section 3(a)(37) of the Securities Exchange Act of 1934. The Uniform Electronic Transactions Act §2(13) defines record in nearly identical terms. The Official Comment explains:

> This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means.

This term is intended to embrace new forms of records that are created or popularized in the future. A record would include, but not be limited to, a registration statement, report, application, book, publication, account, paper, correspondence, memorandum, agreement, document, computer file, or disk, microfilm, photograph, or audio or visual tape.

27. Section 102(26): Sale: Prior Provisions: 1956 Act Section 401(j); RUSA Section 101(13). Both the 1956 Act and RUSA definition of "sale" are modeled on Section 2(a)(3) of the Securities Act of 1933.

Language in Section 401(j) of the 1956 Act addressed the now rescinded SEC "no sale" doctrine and has been eliminated. Merger transactions are usually sales under Section 102(26), but may be exempted from the securities registration requirements by Section 202(18).

28. Section 102(28): Security: Prior Provisions: 1956 Act Section 401(1); RUSA Section 101(16). Much of the definition in Section 102(28), like the definitions in the 1956 Act Section 401(l) and RUSA Section 101(16), is identical to the definition in Section 2(a)(1) of the Securities Act. State courts interpreting the Uniform Securities Act definition of security have often looked to interpretations of the federal definition of security. See generally 2 Louis Loss & Joel Seligman, Security Regulation 923-1138.19 (3d ed. rev. 1999).

The most recent amendments to Section 2(a)(1) of the Securities Act of 1933 were added by the Commodities Futures Modernization Act of 2000 which added or revised language in the Securities Act addressing security futures and securities puts, calls, straddles, options, or privileges. Identical language has been included in Section 102(28) of this Act to harmonize interpretation of the federal and state definition of a "security." With respect to a security futures product, Section 28(a) of the Securities Exchange Act of 1934, as amended by the Commodity Futures Modernization Act of 2000, further provides: "No provision of any State law regarding the offer, sale or distribution of securities

shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability."

Preorganization certificates or subscriptions are included in this term, obviating the need for a separate definition as was included in RUSA Section 402(13).

Section 102(28) uses RUSA's "fractional undivided interest in oil, gas or other mineral rights" formulation, which originated in Section 2(a)(1) of the Securities Act of 1933, rather than the 1956 Act formulation, "certificate of interest or participation in an oil, gas or mining title." In recent years, courts interpreting Section 2(a)(1) of the Securities Act of 1933 have found certain oil, gas or mineral rights to be investment contracts (that is, securities). 2 Louis Loss & Joel Seligman, Securities Regulation 979-982 (3d ed. rev. 1999).

A new sentence was added in Section 102(28)(A) referring to certificated or uncertificated securities to indicate that the term is intended to apply whether or not a security is evidenced by a writing. Section 102(28)(A) is intended to reject *Thomas v. State of Tex.*, 65 S.W.3d 38 (Tex. Crim. App. 2001) (Under Texas law evidence of indebtedness requires a writing).

Insurance or endowment policies or endowment or annuity contracts, other than those on which an insurance company promises to make variable payments, are excluded from this term. Variable insurance products are also excluded in many states and are exempted from securities registration in others under provisions such as Section 201(4). When variable products are included in the definition of security and exempted from registration state securities administrators can bring enforcement actions concerning variable insurance sales practices.

The Drafting Committee recognized that the decision whether to exclude variable annuities from the definition of security will be made on a state-by-state basis. Those states which intend to exclude variable products from the definition of security should add the words "or variable" to Section 102(28)(B) so that it will read:

> (B) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

In the view of the American Council of Life Insurers:

> The brackets around the words "or variable" should be removed to follow the majority of jurisdictions. Thirty-seven jurisdictions [including Guam] currently exclude all insurance, endowment and annuity contracts from the definition of security. Removal of the brackets around the words "or variable," therefore, would incorporate the approach taken in the majority of jurisdictions. The removal of these brackets also prevents a statutory conflict with [up to] 48 jurisdictions that grant the insurance commissioner exclusive jurisdiction to regulate the issuance and sale of variable contracts. Moreover, this approach recognizes that the issuance and sale of variable contracts is comprehensively regulated by the Securities and Exchange Commission, the National Association of Securities Dealers, 50 state insurance departments, and in the case of group life and annuities, the Department of Labor. Like all other financial products, this approach imposes only one, rather than two, levels of regulation in each state and reflects the philosophy of financial services modernization.

In the view of the North American Securities Administrators Association variable products should be exempted from registration, not excluded from the definition of securities:

> One of the goals of this Act is to align state and federal law. The United States Supreme Court ruled that a variable annuity is a security in SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959). More recently, it has been confirmed that variable insurance products are "covered securities" as defined in the National Securities Markets Improvement Act of 1996 (NSMIA) and in the Securities Litigation Uniform Standards Act of 1998 (SLUSA), see Lander v. Hartford Life Annuity Ins., 251 F.3d 101 (2d Cir. 2001).
>
> When variable products are included in the definition of security and exempted from registration, state securities administrators can bring enforcement actions concerning variable insurance sales practices. This approach toward functional regulation is supported by the National Association of Securities Dealers as evidenced by a February 2001 letter from Mary Schapiro, President of Regulatory Policy & Oversight: "Based on our experience, we have found that variable products' sales-related problems parallel those of mutual funds and other securities ... Because of the substantial similarities between variable contracts and other securities products, we believe it is incongruous for agents and sales practices involved in variable annuities not to be covered by state securities laws."
>
> State securities regulators support the functional regulation of agents because: 1) insurance companies are not affected since state securities regulators are preempted from requiring the registration of variable products; 2) the vast majority of broker-dealer subsidiaries of insurance companies

are already registered to sell securities in most states; and 3) the vast majority of agents are already dually licensed to sell insurance and securities in most states.

Section 102(28)(C) includes the exclusion in RUSA from the 1956 definition of security for "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974."

The first clause in Section 102(28)(D) is derived from the leading case of *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), which has been widely followed by federal and state courts. The second clause in Section 102(28)(D) is based, in part, on the leading case of *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 n.7 (9th Cir. 1973), *cert. denied,* 419 U.S. 900 (1974).

The courts have divided over the interpretation of the "common enterprise" element of an investment contract. The courts generally recognize that "horizontal" commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a "vertical" relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(28)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter. See generally 2 Louis Loss & Joel Seligman, Securities Regulation 989-997 (3d ed. Rev. 1999).

In interpreting all elements of the investment contract, the courts have emphasized substance, not form. A conventional partnership involving two individuals who actively participate in its management and who each own 50 percent interest of its profits has consistently not been viewed as an investment contract because profits do not come from the efforts of others. On the other hand, investments in limited partnership interests which are traded on stock exchanges consistently have been held to be investment securities because profits do come substantially from the efforts of others. Indeed, interests in an entity called a general partnership may be a security when the general partnership functions like a limited partnership. See, e.g., *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981), *cert. denied,* 454 U.S. 897 (1981); see generally 2 Loss & Seligman, supra, at 1019-1033.

Section 102(28)(E) is consistent with state and federal securities laws which have recognized interests in limited liability companies and limited partnerships in some circumstances as "securities," see 2 Louis Loss & Joel Seligman, Securities Regulation 1028-1031 (3d ed. rev. 1999), when consistent with the court decisions interpreting the investment contract concept. This Act also refers to an investment in a viatical settlement or a similar agreement to make unequivocally clear that viatical settlement and similar agreements, which otherwise satisfy the definition of an investment contract, are securities. This is intended to reject the holding of one court that a viatical contract could not be a security. See *SEC v. Life Partners Inc.*, 87 F.3d 536 (D.C. Cir. 1996), *reh'g denied,* 102 F.3d 587 (D.C. Cir. 1996). A number of states have done so by statute.

Judicial construction of the term "investment contract" has been the most frequently litigated issue concerning the term "security." See Gabaldon, A Sense of Security: An Empirical Study, 25 J. Corp. L. 307 (2000), explaining that there had been 792 cases decided to that date in which the definition of a security played a prominent role. Id. at 308. Some 461 of the 792 cases (58 percent) concerned investment contracts. Id. at 322. A number of states, by statute, rule, or case law have also adopted the "risk capital" test to find a security when an investment is subject to the risks of an enterprise with the expectation of profit or other valuable benefit and the investor has no direct control over the management of the enterprise. See, e.g., 2 Loss & Seligman, supra, at 939-940 n.50.

29. Section 102(29): Self-regulatory organization: Prior Provision: RUSA Section 101(17). This definition was added by RUSA and is based on a counterpart provision in the American Law Institute Federal Securities Code. At the current time national securities exchanges are registered under Section 6 of the Securities Exchange Act of 1934; national securities associations under Section 15A; clearing agencies under Section 17A; and the Municipal Securities Rulemaking Board under Section 15B.

30. Section 102(30): Sign: No Prior Provision. This definition is intended to facilitate electronic signatures, to the extent permitted by Section 105.

31. Section 102(31): State: Prior Provisions: 1956 Act Section 401(m); RUSA Section 101(18). This is the standard definition used by the National Conference of Commissioners on Uniform State Laws. It does include territories and possessions of the United States, as well as the District of Columbia and Puerto Rico, but does not include foreign governments, their territories, or their possessions. In this Act "foreign" always refers to activity, a government, or person outside of the United

States, not a different state within the United States.

30-14-103. References to federal statutes. — "Securities act of 1933" (15 U.S.C. 77a et seq.), "securities exchange act of 1934" (15 U.S.C. 78a et seq.), "public utility holding company act of 1935" (15 U.S.C. 79 et seq.), "investment company act of 1940" (15 U.S.C. 80a-1 et seq.), "investment advisers act of 1940" (15 U.S.C. 80b-1 et seq.), "employee retirement income security act of 1974" (29 U.S.C. 1001 et seq.), "national housing act" (12 U.S.C. 1701 et seq.), "commodity exchange act" (7 U.S.C. 1 et seq.), "internal revenue code" (26 U.S.C. 1 et seq.), "securities investor protection act of 1970" (15 U.S.C. 78aaa et seq.), "securities litigation uniform standards act of 1998" (112 Stat. 3227), "small business investment act of 1958" (15 U.S.C. 661 et seq.), and "electronic signatures in global and national commerce act" (15 U.S.C. 7001 et seq.) mean those statutes and the rules and regulations adopted under those statutes, as in effect on the date of enactment of this chapter.

History.

I.C., § 30-14-103, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The Securities Litigation Uniform Standards Act of 1998 is P.L. 105-353, which is compiled throughout title 15, United States Code.

Compiler's Notes.

The phrase "the date of enactment of this chapter" at the end of the section refers to the date of enactment of S.L. 2004, ch. 45, which was September 1, 2004.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 401(k); RUSA Section 101(15).

1. There are a large number of references to other laws in this Act, particularly to the federal securities laws identified in Section 103, and to rules adopted by the Securities and Exchange Commission under those laws. One of the main objectives of this Act is to take account of those provisions in the federal laws that are preemptive, and to coordinate with other, nonpreemptive provisions of the federal laws where coordination between federal and state securities law is in the public interest.

2. Section 12(d) of the Uniform Statute and Rule Construction Act, adopted by NCCUSL in 1995, provides: "A statute or rule that incorporates by reference a statute or rule of another jurisdiction does not incorporate a later enactment or adoption or amendment of the other statute or rule." Nevertheless, it is not uncommon for States to permit later amendments to statutes and rules referenced in enacted legislation to become automatically effective. In those states the final bracketed language in this Section should be included in the Act.

3. In those states which do not permit automatic effectiveness of later amendments and that follow Section 12(d) of the Uniform Statute and Rule Construction Act, this problem has been addressed by either giving the administrator the power to update by rule or the duty to notify the legislature when amendment is necessary. When the legislature notification approach is adopted, to prevent a gap period, the administrator might be given the power to act by rule until the legislature has acted.

4. After enactment, amendments to a preemptive federal statute, to rules adopted by a federal agency under a preemptive provision of a federal statute, or to amendments to such rules should be enforced in all states under the Supremacy Clause of the United States Constitution. A number of such references are in this Act.

30-14-104. References to federal agencies. — A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department.

History.

I.C., § 30-14-104, as added by 2004, ch. 45, § 2, p. 169.

30-14-105. Electronic records and signatures. — This chapter modifies, limits and supersedes the federal electronic signatures in global and national commerce act, but does not modify, limit or supersede section 101(c) of that act (15 U.S.C. 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that act (15 U.S.C. 7003(b)). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or an order issued under this chapter, in a manner consistent with section 104(a) of that act (15 U.S.C. 7004(a)).

History.

I.C., § 30-14-105, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The electronic signatures in global and national commerce act, referred to in this section, is codified as 15 USCS § 7001 et seq.

OFFICIAL COMMENT

No Prior Provision.

The purpose of this Section is to permit the filing of electronic signatures and electronic records.

Part 2. Exemptions From Registration of Securities

OFFICIAL COMMENT

Section 201 includes exempt securities and Section 202 includes exempt transactions. Both exempt securities and exempt transactions are exempt from the securities registration, notice filing requirement of Section 302, and the filing of sales literature Section 504 of this Act. Neither Section 201 nor Section 202 provides an exemption from the Act's antifraud provisions in Article 5, nor the broker-dealer, agent, investment adviser, or investment adviser registration requirements in Article 4.

A Section 201 exempt security retains its exemption when initially issued and in subsequent trading.

A Section 202 transaction exemption must be established for each transaction.

Neither the exempt security nor the transaction exemptions are meant to be mutually exclusive. A security or transaction may qualify for two or more exemptions.

Article 2 is not available to any security, transaction, or offer that, although in technical compliance with a specific section in Article 2, is part of an unlawful plan or scheme to evade the registration provisions of Article 3. In such cases registration is required. Cf. Prelim. Note 6 to Regulation D adopted under the Securities Act of 1933.

30-14-201. Exempt securities. — The following securities are exempt from the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code:

(1) A security, including a revenue obligation or a separate security as defined in rule 131 (17 CFR 230.131) adopted under the securities act of 1933, issued, insured or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency, or instrumentality of one (1) or more states; by a political subdivision of one (1) or more states; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by congress; or a certificate of deposit for any of the foregoing;

(2) A security issued, insured or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer or guarantor;

(3) A security issued by and representing, or that will represent, an interest in or a direct obligation of, or be guaranteed by:

(a) An international banking institution;

(b) A banking institution organized under the laws of the United States; a member bank of the federal reserve system; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund, or a successor authorized by federal law, or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the comptroller of currency pursuant to section 1 of public law 87-722 (12 U.S.C. 92a); or

(c) Any other depository institution, or any trust company organized or chartered under the laws of this state, unless by rule or order the administrator proceeds under section 30-14-204, Idaho Code;

(4) A security issued by and representing an interest in, or a debt of, or insured or guaranteed by, an insurance company authorized to do business in this state;

(5) A security issued or guaranteed by a railroad, other common carrier, public utility, or public utility holding company that is:

(a) Regulated in respect to its rates and charges by the United States or a state;

(b) Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada, or a Canadian province or territory; or

(c) A public utility holding company registered under the public utility holding company act of 1935 or a subsidiary of such a registered holding company within the meaning of that act;

(6) A federal covered security specified in section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)) or by a rule adopted under that provision or a security listed or approved for listing on another securities market specified by rule under this chapter; a put or a call option contract; a warrant; a subscription right on or with respect to such securities; or an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the securities exchange act of 1934 and listed or designated for trading on a national

securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the securities exchange act of 1934 or an offer or sale, of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the securities and exchange commission under section 9(b) of the securities exchange act of 1934 (15 U.S.C. 78i(b));

(7) A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic or reformatory purposes, or as a chamber of commerce, and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person, or a security of a company that is excluded from the definition of an investment company under section 3(c)(10)(b) of the investment company act of 1940 (15 U.S.C. 80a-3(c)(10)(B)); except that with respect to the offer or sale of a note, bond, debenture or other evidence of indebtedness issued by such a person, a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons and transactions, imposing different requirements for different classes, specifying with respect to paragraph (b) of this subsection the scope of the exemption and the grounds for denial or suspension, and requiring an issuer:

(a) To file a notice specifying the material terms of the proposed offer or sale and copies of any proposed sales and advertising literature to be used and provide that the exemption becomes effective if the administrator does not disallow the exemption within the period established by the rule;

(b) To file a request for exemption authorization for which a rule under this chapter may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process complying with section 30-14-611, Idaho Code, and grounds for denial or suspension of the exemption; or

(c) To register under section 30-14-304, Idaho Code;

(8) A member's or owner's interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative;

(9) An equipment trust certificate with respect to equipment leased or conditionally sold to a person, if any security issued by the person would be exempt under this section or would be a federal covered security under section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)); and

(10) Any security issued by a domestic or foreign corporation, partnership, trust or association engaged in actual mining operations or the exploration and development of mining properties in this state, whether or not sold through a broker-dealer, provided the following conditions are met:

(a) The term "actual mining operations" within the meaning of this subsection does not include the development or production of gas or oil;

(b) The total amount of the securities to be offered and sold does not

exceed five hundred thousand dollars ($500,000) in any twelve (12) month period;
(c) All sales brochures, pamphlets, advertisements and literature are filed with the director prior to being used;
(d) At least eighty percent (80%) of the gross amount paid by the purchasers of the securities is used in actual mining operations or for actual exploration and development expenses, including legal, accounting, engineering and geological expenses; and
(e) The issuer shall file a report in a form prescribed by the director and at such times that the director by rule may provide, not to exceed once every three (3) months, stating the number of shares or amount of other securities sold, the number of purchasers, the amount of money obtained by the issuer from the sales, and the manner in which the moneys have been expended.

History.

I.C., § 30-14-201, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities exchange act of 1934, referred to in this section, is codified as 15 USCS § 78a et seq.

The public utility holding company act of 1935, referred to in paragraph (5)(b), is codified as 15 USCS § 79 et seq.

Compiler's Notes.

For more on the federal deposit insurance corporation, see *http://www.fdic.gov*.

For national credit union share insurance fund, see *http://www.ncua.gov/about/SIF/Pages/default.aspx*.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 402(a); RUSA Section 401(b).

1. Section 201(1): United States government and municipal securities: Prior Provisions: 1956 Act Section 402(a)(1); RUSA Section 401(b)(1). This exemption generally follows the 1956 Act except that it adds securities "insured" by a specified government to those "issued" or "guaranteed." RUSA, in contrast, also addressed foreign governments, which in this Act are treated separately in Section 201(2). Rule 131 issued under the Securities Act of 1933 defines separate securities issued under governmental obligations.

A significant minority of states have excluded from the Section 201(1) exemption industrial revenue bonds. Interest on these securities is solely repayable from revenues received from a nongovernmental industrial or commercial enterprise. Typically this exclusion will not operate if (A) the payments are made or unconditionally guaranteed by a person whose securities are exempt from registration under Section 18(b)(1) of the Securities Act of 1933, or (B) in accordance with a rule under this [Act], the issuer first files a notice in a record specifying the terms of the proposed offer or sale and a copy of the offering statement and the administrator does not disallow the exemption within the time period established by the rule.

2. Section 201(2): Foreign government securities: Prior Provisions: 1956 Act Section 402(a)(2); RUSA Section 401(b)(2). The 1956 Act, as amended, and RUSA both reached foreign governments as specified in Section 201(2) and separately treated "a security issued, insured, or guaranteed by Canada, a Canadian province or territory, a political subdivision of Canada or a Canadian province or territory, an agency or corporate or other instrumentality of one or more of the foregoing." The separate treatment of Canadian securities is largely redundant and has been eliminated from this Section.

3. Section 201(3): Depository institution and international banking institution securities: Prior Provision: RUSA 401(b)(3). Section

402(a)(3) of the 1956 Act exempts specified bank and similar depository institutions; Section 402(a)(4) exempts specified savings and loan and similar thrift institution securities; and Section 402(a)(6) exempts specified credit union securities. RUSA Section 401(b)(3) combines the three types of depository institutions into a common definition (see RUSA Section 101(13)) which are adopted in this Act as Sections 102(3) and 102(5)) and a common exemption (see RUSA Section 401(b)(3)) which is adopted in this subsection.

Banks specified in Section 3(a)(2) of the Securities Act of 1933 issue federal covered securities under Section 18(b)(4)(C) of the Securities Act of 1933. Section 201(3)(C) applies to securities issued by depository institutions without depository insurance. Under Section 204, the administrator will have the ability to revoke or limit this exemption.

4. Section 201(4): Insurance company securities: Prior Provisions: 1956 Act Section 402(a)(5); RUSA Section 401(b)(4). The issuance, insurance, or guarantee of securities by an insurance company is extensively regulated by state insurance commissions or other state agencies.

Under this Act insurance, endowment policies, or annuity contracts under which an insurance company promises to pay fixed sums are excluded from the definition of a security in Section 102(28)(B).

Unless brackets are removed from the words "or variable" in Section 102(28)(B), a variable annuity or other variable insurance product would be considered a security under this Act and under federal securities law. See *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 (1959); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

A variable annuity or other variable insurance product issued by an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 would be a "federal covered security," see Section 102(7). See *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001).

A variable annuity or other variable insurance product not issued by a registered investment company would be exempted by Section 201(4), but would be subject to the antifraud provisions in Article 5.

5. Section 201(5): Common carrier and public utility securities: Prior Provisions: 1956 Act Section 401(a)(7); RUSA Section 401(b)(5). Both the 1956 Act and RUSA include references, omitted here, to the Interstate Commerce Commission, whose enabling legislation subsequently was repealed. Public utility holding companies covered by this exemption are subject both to the Public Utility Holding Company Act and to state or Canadian utility regulation.

6. Section 201(6): Certain options and rights: No Prior Provision. The 1956 Act Section 402(a)(8) provided an exemption for securities listed on the New York, American, Midwest (now Chicago), or other designated stock exchanges, senior or substantially equal securities of the same issuer listed on the exchange and any security covered by listed or approved subscription rights or warrants, or any warrant or right to purchase or subscribe to any security exempted by Section 402(a)(8).

RUSA essentially retained this exemption in Section 401(b)(7) and added securities designated for inclusion in the National Market System by the National Association of Securities Dealers in Section 401(b)(8) and specified options issued by a clearing agency registered under the Securities Exchange Act of 1934 in Section 401(b)(9).

In 1996 Congress enacted the National Securities Markets Improvement Act and provided in Section 18(b)(1) that securities listed on the New York, American or Nasdaq Stock Exchange, or designated by rule of the Securities and Exchange Commission, as well as any security of the same issuer that is equal in seniority or senior to any of these securities will be a federal covered security. Under Rule 146 the SEC has designated as federal covered securities under Section 18(b)(1) Tier I of the Pacific Exchange; Tier I of the Philadelphia Stock Exchange; and The Chicago Board Options Exchange on condition that the relevant listing standards continue to be substantially similar to those of the New York, American, or Nasdaq stock markets. See Reporter's Note to Section 102(7). A federal covered security subject to Section 18(b)(1) of the Securities Act of 1933 will not be subject to the securities registration requirements of Sections 301 and 303 through 306.

The exemption in Section 201(6) addresses specified options, warrants, and rights that are not federal covered securities under Section 18(b)(1) of the Securities Act of 1933, but generally would have been exempted under RUSA. The 1956 Act, which was narrower, was drafted before the computerized Nasdaq stock market began trading the National Market List and the development of standardized options markets.

The final clause of Section 201(6) makes clear that any offer or sale of the underlying security that occurs as a result of the offer or sale of an option or other derivative security exempted under this provision or as the result of the exercise of the option or other derivative security, is covered by the exemption if the option met the terms of the exemption at the time such derivative security was written (that is, sold) or issued. The sale of the underlying security when an option is exercised would be exempt even if the underlying secu-

rity is not at that time subject to any exemption under the Act. This is consistent with existing precedent under federal law suggesting that the legality of the sale of an underlying security when an option is exercised should be determined by the status of the security at the time the option was written rather than at the time of exercise. See, e.g., *H. Kook & Co., Inc. v. Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93 (2d Cir. 1969). Any transaction in an underlying security that results from the offer, sale, or exercise of any derivative security issued by a registered clearing agency and traded on a national securities exchange or association is exempt if the derivative security when written was exempt under Section 201(6).

The Securities and Exchange Commission has adopted Rule 9b-1 under Section 9(b).

7. Section 201(7): Nonprofit organization securities: Prior Provision: Section 3(a)(4) of the Securities Act of 1933. Section 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA exempt specified nonprofit securities. Both are modeled on Section 3(a)(4) of the Securities Act, which was subsequently amended.

Securities issued under Section 3(a)(4) of the Securities Act of 1933 are not treated as federal covered securities in Section 18(b)(4)(C), although a separate Section 3(a)(13) exemption which addresses certain church plan securities are federal covered securities under Section 18(b)(4)(C).

RUSA included an optional notice and review requirement for nonprofit securities in Section 401(b)(10) "if at least ten days before a sale of the security the person has filed with the administrator a notice setting forth the material terms of the proposed sale and copies of any sales and advertising literature to be used and the administrator by order does not disallow the exemption within the next five full business days."

The nonprofit exemption is of particular concern to state securities administrators. See, e.g., State Regulators Announce Dramatic Rise in Religious Scams; Tens of Thousands Lured, 33 Sec. Reg. & L. Rep. (BNA) 1189 (2001).

Under Section 6 of the Philanthropy Protection Act, Congress preempted application of the registration provisions of state securities laws to issuance of securities covered by Section 3(c)(10) of the Investment Company Act of 1940 unless states acted within three years of enactment (December 1998) to pass special state legislation cancelling federal preemption. Ten states enacted such legislation. Those states may preserve this treatment of Section 3(c)(10) securities by deleting from Section 201(7) the phrase "or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940."

Section 201(7) provides statutory authority for the states to adopt rules with respect to notes, bonds, debentures and other evidences of indebtedness issued by nonprofit organizations. Each state may adopt different rules tailored for various types of nonprofit debt offerings, (e.g., local church bond offerings, national church bond offerings, church extension funds, charitable gift annuities). For states that do not wish to provide an automatic exemption from registration for a particular type of nonprofit debt instrument or offering, Section 201(7) creates three categories of regulatory review that may be required by rule: (a) exemption by notice filing, (b) exemption by state authorization, and (c) registration by qualification. These categories are consistent with the manner in which many states currently review different types of nonprofit debt securities. See Horner & Makens, Securities Regulation of Religious and Other Nonprofit Organizations, 27 Stetson L. Rev. 473 (1997).

8. Section 201(8): Cooperatives: Prior Provision: RUSA Section 401(b)(13). Section 201(8) is derived from RUSA Section 401(b)(13) which was included in that act after a number of states had adopted exemptions for securities issued by cooperatives. Section 201(8) is not intended to be available if securities are offered or sold to the public generally.

The 1956 Act Section 402(a)(12) had instead provided: "insert any desired exemption for cooperatives." The Reporter for the 1956 Act had found such sharp variation among the 18 states that then had adopted a cooperative exemption that "no common pattern can be found." Louis Loss, Commentary on the Uniform Securities Act 118 (1976).

9. Section 201(9): Equipment trust certificates: Prior Provision: RUSA Section 401(b)(6). The Securities Act of 1933 Section 3(a)(6) includes a narrower exemption for railroad equipment trusts. Section 201(9) follows RUSA. The Official Comment to RUSA Section 401(b)(6) explained:

The new paragraph (b)(6) reflects the extensive development of equipment lease financing through leveraged leases, conditional sales, and other devices. The underlying premise is that if the securities of the person using such a financing device would be exempt under some other paragraph of Section 401, the equipment trust certificate or other security issued to acquire the property in question also is exempt.

30-14-202. Exempt transactions. — The following transactions are

exempt from the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code:

(1) An isolated nonissuer transaction, whether or not effected by or through a broker-dealer;

(2) A nonissuer transaction by or through a broker-dealer registered, or exempt from registration under this chapter, and a resale transaction by a sponsor of a unit investment trust registered under the investment company act of 1940, in a security of a class that has been outstanding in the hands of the public for at least ninety (90) days, if, at the date of the transaction:

(a) The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership, and the issuer is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(b) The security is sold at a price reasonably related to its current market price;

(c) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the broker-dealer as an underwriter of the security or a redistribution;

(d) A nationally recognized securities manual or its electronic equivalent designated by any rule adopted or an order issued under this chapter or a record filed with the securities and exchange commission that is publicly available and contains:

(i) A description of the business and operations of the issuer;

(ii) The names of the issuer's executive officers and the names of the issuer's directors, if any;

(iii) An audited balance sheet of the issuer as of a date within eighteen (18) months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and

(iv) An audited income statement for each of the issuer's two (2) immediately previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had audited income statements, a pro forma income statement; and

(e) Any one (1) of the following requirements is met:

(i) The issuer of the security has a class of equity securities listed on a national securities exchange registered under section 6 of the securities exchange act of 1934 or designated for trading on the national association of securities dealers automated quotation system;

(ii) The issuer of the security is a unit investment trust registered under the investment company act of 1940;

(iii) The issuer of the security, including its predecessors, has been engaged in continuous business for at least three (3) years; or

(iv) The issuer of the security has total assets of at least two million dollars ($2,000,000) based on an audited balance sheet as of a date

within eighteen (18) months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had such an audited balance sheet, a pro forma balance sheet for the combined organization;

(3) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the board of governors of the federal reserve system;

(4) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in an outstanding security if the guarantor of the security files reports with the securities and exchange commission under the reporting requirements of section 13 or 15(d) of the securities exchange act of 1934 (15 U.S.C. 78m or 78o(d));

(5) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security that:

(a) Is rated at the time of the transaction by a nationally recognized statistical rating organization in one (1) of its four (4) highest rating categories; or

(b) Has a fixed maturity or a fixed interest or dividend, if:

(i) A default has not occurred during the current fiscal year or within the three (3) previous fiscal years of the issuer or any predecessor, in the payment of principal, interest, or dividends on the security; and

(ii) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous twelve (12) months a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(6) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter effecting an unsolicited order or offer to purchase;

(7) A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;

(8) A nonissuer transaction by a federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting in the exercise of discretionary authority in a signed record for the account of others;

(9) A transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one (1) or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the administrator after a hearing as provided in section 30-14-202A, Idaho Code, or otherwise;

(10) A transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(11) A transaction in a note, bond, debenture or other evidence of indebtedness secured by a mortgage or other security agreement if the note,

bond, debenture or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;

(12) A transaction by an executor, administrator of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator;

(13) A sale or offer to sell to:

(a) An institutional investor;

(b) A federal covered investment adviser; or

(c) Any other person exempted by a rule adopted or an order issued under this chapter;

(14) A sale or an offer to sell securities of an issuer, if the transaction is part of a single issue in which:

(a) Not more than ten (10) purchasers are present in this state during any twelve (12) consecutive months, other than those designated in subsection (13) of this section;

(b) A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(c) A commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this chapter or an agent registered under this chapter for soliciting a prospective purchaser in this state; and

(d) The issuer reasonably believes that all the purchasers in this state, other than those designated in subsection (13) of this section, are purchasing for investment;

(15) A transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this state;

(16) An offer to sell, but not a sale, of a security not exempt from registration under the securities act of 1933 if:

(a) A registration or offering statement or similar record as required under the securities act of 1933 has been filed, but is not effective, or the offer is made in compliance with rule 165 adopted under the securities act of 1933 (17 CFR 230.165); and

(b) A stop order of which the offeror is aware has not been issued against the offeror by the administrator or the securities and exchange commission, and an audit, inspection or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

(17) An offer to sell, but not a sale, of a security exempt from registration under the securities act of 1933 if:

(a) A registration statement has been filed under this chapter, but is not effective;

(b) A solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the administrator under this chapter; and

(c) A stop order of which the offeror is aware has not been issued by the administrator under this chapter and an audit, inspection or proceeding that may culminate in a stop order is not known by the offeror to be pending;

(18) A transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other person, or its parent or subsidiary, are parties;

(19) A rescission offer, sale or purchase under section 30-14-510, Idaho Code;

(20) An offer or sale of a security to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter;

(21) Employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

(a) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisers;

(b) Family members who acquire such securities from those persons through gifts or domestic relations orders;

(c) Former employees, directors, general partners, trustees, officers, consultants and advisers if those individuals were employed by or providing services to the issuer when the securities were offered; and

(d) Insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than fifty percent (50%) of their annual income from those organizations;

(22) A transaction involving:

(a) A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property or stock;

(b) An act incident to a judicially approved reorganization in which a security is issued in exchange for one (1) or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or

(c) The solicitation of tenders of securities by an offeror in a tender offer in compliance with rule 162 adopted under the securities act of 1933 (17 CFR 230.162); or

(23) A nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this chapter, if the issuer is a reporting issuer in a foreign jurisdiction designated by this

subsection or by a rule adopted or an order issued under this chapter; has been subject to continuous reporting requirements in the foreign jurisdiction for not less than one hundred eighty (180) days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this subsection or by a rule adopted or an order issued under this chapter, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this subsection, Canada, together with its provinces and territories, is a designated foreign jurisdiction and the Toronto stock exchange, inc., is a designated securities exchange. After an administrative hearing in compliance with chapter 52, title 67, Idaho Code, the administrator, by rule adopted or an order issued under this chapter, may revoke the designation of a securities exchange under this subsection, if the administrator finds that revocation is necessary or appropriate in the public interest and for the protection of investors.

History.

I.C., § 30-14-202, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 1, p. 415; am. 2012, ch. 65, § 2, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, deleted the paragraph (11)(a) designation and deleted paragraphs (11)(b) and (11)(c), which read: "(b) A general solicitation or general advertisement of the transaction is not made; and (c) A commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under this chapter as a broker-dealer or as an agent".

The 2012 amendment, by ch. 65, inserted "and" preceding "contains" near the end of the introductory paragraph in (2)(d).

Federal References.

The investment company act of 1940, referred to in this section, is codified as 15 USCS § 80a-1 et seq.

Section 6 of the securities exchange act of 1934, referred to in (2)(e)(i), is codified as 15 USCS § 78f.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

For more on the Toronto stock exchange, inc., see *http://www.tmx.com/en/index.html*.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Enjoining Sales.

Where defendant failed to carry his burden under the nonpublic offer and limited offering exemptions and failed to establish that a genuine issue of material fact existed on the issue of securities fraud, summary judgment was properly granted to Idaho department of finance seeking a permanent injunction to prohibit defendant from selling said securities. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995).

OFFICIAL COMMENT

1. Sections 202(1) through (8) are available only for nonissuer transactions. An issuer selling securities in an initial public offering or other offering may not rely on Sections 202(1) through (8). A nonissuer, however, can rely on any issuer transaction exemption such as Section 202(13), when the exemption would be applicable to a nonissuer. The term "nonissuer transaction or nonissuer distribution" is defined in Section 102(18); the term "issuer" is defined in Section 102(17).

2. Section 202(1): Isolated nonissuer transactions: Prior Provisions: 1956 Act Section 402(b)(1); RUSA Section 402(1). The term

"isolated transaction" is not defined in this Act, but left to the states to develop. Historically under state law there has been somewhat varied case law development of the term "isolated transactions." See, e.g., *Blinder, Robinson & Co., Inc. v. Goettsch*, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer transaction exemption is not unconstitutionally vague); *Allen v. Schauf*, 449 P.2d 1010 (Kan. 1969) (regulation defined isolated transactions to not exceed four persons solicited in a 12 month period); *Nelson v. State*, 355 P.2d 413, 420 (Okla. Ct. Crim. App. 1960) ("[a]n isolated sale means one standing alone, disconnected from any other"); see generally 1 Louis Loss & Joel Seligman, Securities Regulation 125-130 (3d ed. rev. 1998).

In general this subsection is intended to cover the occasional sale by a person. It would not exempt multiple or successive transactions by a person or group, whether those sales are sufficient to constitute a "distribution" as that term is used for purposes of the federal securities laws, see 2 Louis Loss & Joel Seligman, Securities Regulation 1138.50-1138.52 (3d ed. rev. 1999), or merely too frequent to be considered "isolated" under the relevant state law.

Limited issuer offering transactions are separately addressed in Section 202(14).

3. Section 202(2): Nonissuer transactions in specified outstanding securities: Prior Provisions: 1956 Act Section 402(b)(2); RUSA Sections 402(3) and (4). This Section represents a modernization of the securities manual exemption which was included in both the 1956 Act and RUSA. NASAA recommended an amendment to the 1956 Act Section 402(b) after discussion with the Securities Industry Association and others in the securities industry. This Section generally follows the NASAA amendment.

Rule 419 issued under the Securities Act of 1933 defines a "blank check company" to be a company that "is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person." A "blind pool" is similar and would involve an investment in a blank check or other entity with no identified business plan or purpose. A "shell company" is also similar and would involve an entity which, to date, has no significant business assets, plan, or purpose.

4. Section 202(3): Nonissuer transactions in specified foreign transactions: No Prior Provision. The NASAA recommendation that was the basis of Section 202(2) also included specified foreign nonissuer transactions subject to a manual exemption when there was disclosure of the issuer's officers and directors in the issuer's country of domicile. This subsection uses margin securities as an alternative approach to identify sufficiently seasoned foreign securities. Margin securities are required to be in compliance with Regulation T which was adopted by the Board of Governors of the Federal Reserve System.

5. Section 202(4): Nonissuer transactions in securities subject to Securities Exchange Act reporting: Prior Provision: RUSA Section 402(2). RUSA added this exemption to authorize nonissuer secondary trading in the securities of issuers that were subject to the periodic reporting requirements of the Securities Exchange Act of 1934. To bar immediate secondary trading in nonregistered initial public offerings, there was a further requirement that these securities be subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 for not less than 90 days. Section 202(4) only covers the guarantor because if the issuer of the security is a reporting company under Sections 13 or 15(d) of the Securities Exchange Act of 1934, the transaction is preempted by Section 18(b)(4)(A) of the Securities Act of 1933.

Section 18(b)(4)(A) of the National Securities Markets Improvement Act of 1996 defines nonissuer transactions under Section 4(1) of the Securities Act of 1933 ("transactions by persons other than an issuer, underwriter, or dealer") as "federal covered securities," see Section 102(7), if the issuer files reports with the Securities and Exchange Commission under Sections 13 or 15(d) of the Securities Exchange Act of 1934. Under Section 18(a) of the Securities Act of 1933 no state statute, rule, order, or other administrative action with respect to registration of securities or reporting requirements may apply to a federal covered security. To harmonize Section 202(4) with Sections 18(a) and 18(b)(4)(A) of the Securities Act of 1933, the 90 day reporting period in RUSA Section 402(2) is not adopted in this Act.

6. Section 202(5): Nonissuer transactions in specified fixed income securities: Prior Provisions: 1956 Act Section 402(b)(2)(B); RUSA Section 402(4). The concept of a fixed income security rated by a nationally recognized statistical rating organization in one of its four highest rating categories described in Section 202(5)(A) is well established in federal securities law in Form S-3 adopted under the Securities Act of 1933 and the net capital Rule 15c3-1(c)(2)(vi)(F) adopted under the Securities Exchange Act of 1934. See 2 Louis Loss & Joel Seligman, Securities Regulation 649-653 (3d ed. rev. 1999). Nationally recognized statistical rating organizations have been identified by the Securities and Exchange Commission and include such organizations as Moody's and Standard and Poor's. Rating categories typically begin with AAA and un-

der this Act would include BBB as the fourth highest rating category.

Section 202(5)(B) follows the 1956 Act and RUSA, but also addresses blank check and similar offerings, which became major concerns at the state and federal levels during the past two decades. Cf. Securities Act of 1933 Rule 419. See Official Comment (3).

This subsection includes both debt securities with fixed maturity or a fixed interest rate and preferred stock with fixed dividend provisions.

7. Section 202(6): Unsolicited brokerage transactions: Prior Provisions: 1956 Act Section 402(b)(3); RUSA Section 402(5). Section 18(b)(4)(B) of the Securities Act of 1933 defines as federal covered securities those subject to Section 4(4) of the Securities Act of 1933: "brokerage transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." Section 202(6) is intended to provide exemption for nonagency transactions by dealers not within the scope of Section 4(4).

The 1956 Act Section 402(b)(3) had provided that the administrator "may by rule require that the customer acknowledge upon a specified form that the same was unsolicited, and that a signed copy of each such form be preserved by the broker-dealer for a specified period." This type of requirement is preempted by Section 18(a) of the Securities Act of 1933 for federal covered securities and is viewed as unnecessary for the limited class of dealer nonagency transactions that will be exempted by Section 202(6).

8. Section 202(7): Nonissuer transactions by pledgees: Prior Provisions: 1956 Act Section 402(b)(7); RUSA Section 402(9). This subsection is identical to the 1956 Act and substantively identical to RUSA.

9. Section 202(8): Nonissuer transactions with federal covered investment advisers: No Prior Provision. This exemption was added because of a recognition that federal covered investment advisers are sophisticated financial professionals capable of determining the merits of a security and do not require the protections provided by requiring registration in a particular state.

10. Section 202(9): Specified exchange transactions: No Prior Provision. Section 202(9) provides a state counterpart to the exemption in Section 3(a)(10) of the Securities Act of 1933.

11. Section 202(10): Underwriter transactions: Prior Provisions: 1956 Act Section 402(b)(4); RUSA Section 402(6). This subsection is substantively identical to the 1956 Act and RUSA.

12. Section 202(11): Unit secured transactions: Prior Provisions: 1956 Act Section 402(b)(5); RUSA Section 402(7). In recent years the application of this exemption has been one of concern to state securities administrators. The conditions that conclude this exemption are new and are intended to address these concerns.

13. Section 202(12): Bankruptcy, guardian, or conservator transactions: Prior Provisions: 1956 Act Section 402(b)(6); RUSA Section 402(8). This subsection is identical to that in the 1956 Act and RUSA.

14. Section 202(13): Transactions with specified investors: Prior Provision: 1956 Act Section 402(b)(8). The 1956 Act contains similar but less inclusive language in Section 402(b)(8). If the Securities and Exchange Commission adopts a rule defining "qualified purchaser" as used in Section 18(b)(3) of the Securities Act to specify certain purchasers of federal covered securities, part or all of this exemption will be redundant. As of September 2002, the Commission has proposed, but not adopted, Rule 146(c).

Section 202(13)(B) is limited to transactions for the account of a federal covered investment adviser and is not intended to reach transactions on behalf of others by such adviser.

15. Section 202(14): Limited offering transactions: Prior Provisions: 1956 Act Section 402(b)(9); RUSA Section 402(11). The reference in the prefatory language to "a single issue" signifies that two or more issues can be "integrated" and potentially destroy the exemption. There are two general tests for integration under the federal securities laws. The states similarly have followed generally these types of integration principles with respect to securities transaction exemptions. First, there is a six month "buffer" before and after an offer, offer to sell, or sale of a transaction exempt under Section 202(14) during which no other issue can be distributed if integration automatically is to be avoided. See Rule 147(b)(2) and Rule 502(a) of the Securities Act of 1933. Second, if two issues occur within six months, integration may occur depending upon the following factors:

(i) are the offerings part of a single plan of financing;

(ii) do the offerings involve issuance of the same class of securities;

(iii) are the offerings made at or about the same time;

(iv) is the same type of consideration to be received; and

(v) are the offerings made for the same general purpose.

See generally 3 Louis Loss & Joel Seligman, Securities Regulation 1231-1248 (3d ed. rev. 1999).

Section 402(b)(9) of the 1956 Act and Section 402(11) of the 1985 Act provide alternative limited offering transaction exemptions. The 1956 Act was limited to offers to no more

than ten persons (other than institutional investors specified in Section 402(b)(8)); all purchasers in the State had to purchase for investment; and no remuneration was given for soliciting prospective purchasers in the State. RUSA, in contrast, was limited to no more than 25 purchasers (other than financial or institutional investors); no general solicitation or advertising; and no remuneration was paid to a person other than a broker-dealer for soliciting a prospective purchaser.

This Section would apply to preorganization limited offerings as well as operating company limited offerings. The Securities Act of 1933 Sections 3(b) and 4(2) also apply to both. In contrast, the 1956 Act Section 402(b)(10) and RUSA Section 402(12) used similar concepts in separate Sections to apply to preorganization limited offerings.

Section 18(b)(4)(D) of the Securities Act of 1933 defines as federal covered securities those issued under Securities and Exchange Commission rules under Section 4(2) of the Securities Act. This would include Rule 506, which uses the "accredited investor" definition in Rule 501(a). When a transaction involves Rule 506, Section 18(b)(4)(D) further provides "that this paragraph does not prohibit a state from imposing notice filing requirements that are substantially similar to those required by rule or regulation under Section 4(2) that are in effect on September 1, 1996." These notice requirements are found in Section 302(c) of this Act.

A majority of states have adopted a Uniform Limited Offering Exemption, coordinate to varying degrees with Regulation D. The authority to adopt this and other exemptive rules is provided in Section 203.

16. Section 202(15): Transactions with existing security holders: Prior Provisions: 1956 Act Section 402(b)(11); RUSA Section 402(14). Section 3(a)(9) of the Securities Act of 1933 exempts exchange offerings with existing security holders. Under Section 18(b)(4)(C) transactions subject to Section 3(a)(9) are federal covered securities. See Section 102(7). Notice requirements in the earlier 1956 Act and RUSA accordingly would be preempted by the Securities Act of 1933. See Section 18(a) of the Securities Act of 1933. Otherwise this exemption is substantively identical to the 1956 Act and RUSA.

17. Section 202(16): Offerings registered under this [Act] and the Securities Act of 1933: Prior Provisions: 1956 Act Section 402(b)(12); RUSA Section 402(15). This exemption generally follows the 1956 Act and RUSA. Rule 165 of the Securities Act of 1933, which was adopted in 1999, allows the offeror of securities in a business combination to make written communications that offer securities for sale before a registration statement is filed as long as specified conditions are satisfied.

RUSA Section 402(15)(ii) also required that a registration statement be filed under this Act, but not yet be effective. By eliminating the filing requirement this exemption will reach the offer (but not the sale) of a security that is anticipated to be a federal covered security by applying for listing on the New York Stock Exchange or other exchange specified in Section 18(b)(1) of the Securities Act of 1933, but the listing and federal covered security status has not yet become effective.

18. Section 202(17): Offerings when registration has been filed, but is not effective under this [Act] and exempt from the Securities Act of 1933: Prior Provisions: RUSA Section 402(16). If a rule is adopted by the administrator a solicitation of interest document must accompany a registration by qualification as specified in Section 304(b)(13).

Oral offers may be made after a registration statement has been filed, both before and after a registration statement is effective.

This exemption does not operate unless the administrator adopts a rule under 202(17)(B).

19. Section 202(18): Control transactions: Prior Provision: RUSA Section 402(17). Until 1972 mergers and similar transactions were not considered to involve sales and did not have to register under the Securities Act of 1933. In 1972 the Securities and Exchange Commission adopted Rule 145 defining many mergers and similar transactions to be sales and abandoned its earlier "no sale" doctrine. See 3 Louis Loss & Joel Seligman, Securities Regulation 1262-1280 (3d ed. rev. 1999).

Because most merger and similar transactions require shareholder approval and shareholders often have appraisal rights if they choose to dissent, the potential for abuse is less than in an offering of securities for cash. When appropriate the administrator can deny, condition, limit or revoke this exemption under Section 204. Section 202(18) does not follow the requirement in RUSA Section 402(17) that written notice of the transactions and a copy of the solicitation materials be given to the administrator 10 days before the consummation of the transaction and, that the administrator is empowered to disallow the exemption within the next 10 days.

20. Section 202(19): Rescission offers: No Prior Provision. See Section 510 for discussion of rescission offers.

21. Section 202(20): Out-of-state offers or sales: Source of law: Colo. Section 11-51-102(7). Compare *A.S. Goldmen & Co., Inc. v. New Jersey Bur. of Sec.*, 163 F.3d 780 (3d Cir. 1999), which held that under the United States Constitution's Commerce Clause a State could authorize a securities administrator to prevent a broker-dealer from selling securities from a State to purchasers in other

States where purchase of the securities was authorized. The concluding phrase "and is not part of an unlawful plan or scheme to evade this [Act]" is intended to preclude reliance on this exemption by boiler rooms and others engaged in illegal activities.

Section 202(20) provides an exemption from securities registration and does not address an administrator's power to investigate and bring enforcement actions under Articles 5 and 6.

22. Section 202(21): Employee benefit plans: Prior Provision: RUSA Section 401(b)(12). The 1956 Act Section 402(a)(11) was limited to investment contracts issued in connection with specified employee benefit plans if the administrator was given 30 days written notice.

In 1979, the United States Supreme Court in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), held that a noncontributory, mandatory pension plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) was not a security within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934. The Securities and Exchange Commission staff subsequently took the position that the interests of employees in involuntary, contributory plans are not securities. Sec. Act Rel. 6188, 19 SEC Dock. 465, 473 (1980). Both contributory and noncontributory pension or welfare plans subject to ERISA are excluded from the definition of security in Section 102(28).

In this definition, the term "advisors" does not mean "investment advisers," as defined in Section 102(15).

With respect to employee benefit plans that are securities, Section 202(21) provides an exemption, but follows RUSA in not limiting the exemption to investment contracts and not requiring 30 days notice to the administrator.

Section 202(21) is modeled, in part, on Rule 701(c) adopted under the Securities Act of 1933. Compliance with Rule 701 will provide compliance with this exemption.

Both the 1956 Act and RUSA, for unstated reasons, treated employee benefit plans as exempt securities, rather than exempt securities transactions. There appears to be no appropriate reason to do so.

Resale of employee benefit plan securities can occur under appropriate section 202 transaction exemptions. Section 202(21) is not intended to provide a new method of publicly issuing securities.

The administrator, when appropriate, can deny, condition, limit, or revoke an exemption under Section 202(21). See Section 204.

23. Section 202(22): Specified dividends and tender offers and judicially recognized reorganizations: Prior Provision: 1956 Act Section 401(j)(6)(B) and (D); RUSA Section 101(13)(vi). Section 202(22)(A) and (B) generally follow exclusions from the definition of sale in the 1956 Act and RUSA. Section 202(22)(C) is new and corresponds to Rule 162, recently adopted under the Securities Act of 1933, which allows the offeror in a stock exchange offer to solicit tenders of securities before a registration statement is effective as long as no securities are purchased until the registration statement is effective and the tender offer has expired.

24. Section 202(23): Nonissuer transactions involving specified foreign issuer securities traded on designated securities exchanges. This exemption expressly covers Toronto Stock Exchange issuers that are public reporting companies under Canadian securities law and meet the 180 day continuous reporting requirement. In conformance with the North American Free Trade Agreement (NAFTA) and General Agreement on Trade in Services (GATS), the exemption separately provides authority for the administrator to designate by rule or order other specific foreign jurisdictions and their trading exchanges upon an adequate showing. The exemption also provides authority for an administrator to revoke any designation if necessary or appropriate in the public interest and for the protection of investors.

30-14-202A. Fairness hearing. — (a) The administrator is expressly authorized to hold a hearing and consider the fairness of the terms and conditions of a transaction described in section 30-14-202(9), Idaho Code. This section 30-14-202A, Idaho Code, is intended to provide for a fairness hearing before the administrator with respect to transactions which, if approved by the administrator, will be exempt from the registration requirements of the federal securities laws under section 3(a)(10) of the securities act of 1933, or any section comparable thereto which may subsequently be enacted.

(b) An application for approval shall describe the proposed transaction and shall be in such form, contain such information and be accompanied by such documents as the administrator shall reasonably require by rule or

otherwise. The applicant shall pay to the administrator a filing fee of three hundred dollars ($300) and shall file with the administrator an undertaking to defray the costs of a hearing officer and a stenographer for the hearing.

(c) An application for approval shall be set for hearing within thirty (30) days after the filing of an application. The applicant shall give notice of the hearing to all persons to whom securities are to be issued in the proposed transaction, and all such persons shall have the right to appear at the hearing.

(d) Within ten (10) days after the hearing, the administrator shall issue an order either granting or denying approval of the terms of conditions of the proposed plan. The order shall grant approval if the proposed transaction is fair, equitable and free from fraud. The order shall deny approval if the proposed transaction is unfair, inequitable or not free from fraud.

History.

I.C., § 30-14-202A, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

Section 3(a)(10) of the securities act of 1933, referred to in subsection (a) of this section, is codified as 15 USCS § 78c(a)(10).

30-14-203. Additional exemptions and waivers. — (1) A rule adopted or an order issued under this chapter may exempt a security, transaction or offer.

(2) A rule adopted under this chapter may exempt a class of securities, transactions or offers from any or all of the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code.

(3) An order issued under this chapter may waive, in whole or in part, any or all of the conditions for an exemption or offer under sections 30-14-201 and 30-14-202, Idaho Code.

History.

I.C., § 30-14-203, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: RUSA Section 403.

1. Under this type of authority, 50 of 53 jurisdictions through September 2002 had adopted the Uniform Limited Offering Exemption (ULOE) or a Regulation D exemption, and 32 jurisdictions had adopted a Rule 144A exemption. This Act does not incorporate ULOE or a Rule 144A exemption because of their complexity and the likelihood of periodic updating of their provisions. Rule 144A, and similar exemptions in ULOE, can be most effectively implemented by rule rather than statute.

2. Under Section 203 a state would also be authorized to adopt by rule or order new exemptions as circumstances warrant for new technologies such as the Internet. Cf. NASAA Resolution Regarding Securities Offered on Internet, NASAA Rep. ¶ 7040 (Jan. 7, 1996).

3. It is the intent of this Section that ULOE, Rule 144A, and additional exemptions or waivers be adopted uniformly by states, to the extent this is practicable.

30-14-204. Denial, suspension, revocation, condition or limitation of exemptions. — (a) Enforcement related powers. Except with respect to a federal covered security or a transaction involving a federal covered security, an order under this chapter may deny, suspend application of, condition, limit, or revoke an exemption created under section 30-14-201(3)(c), (7) or (8), Idaho Code, or section 30-14-202, Idaho Code, or an exemption or waiver created pursuant to section 30-14-203, Idaho Code, with respect to a specific security, transaction or offer. An order under this section may be issued only pursuant to the procedures set forth in section 30-14-306(d) or 30-14-604, Idaho Code, and only prospectively.

(b) Knowledge of order required. A person does not violate section 30-14-301, 30-14-303 through 30-14-306, 30-14-504 or 30-14-510, Idaho Code, by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

History.
I.C., § 30-14-204, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provision: 1956 Act Section 402(c); RUSA Section 404.

1. Section 204 is potentially far reaching. The ability to deny, condition, limit, or revoke the exemptions specified in Sections 201(3)(C), 201(7), 201(8), 202, or 203 is adopted concomitant with the breadth of these exemptions. One or more than one security, transaction, or offer can be covered by a Section 204 order.

2. The courts have given a securities administrator's decision to deny or revoke an exemption substantial deference when there was compliance with applicable due process and statutory requirements. See, e.g., *Johnson-Bowles Co., Inc. v. Div. of Sec.*, 829 P.2d 101 (Utah Ct. App. 1992).

Part 3. Registration of Securities and Notice Filing of Federal Covered Securities

30-14-301. Securities registration requirement. — It is unlawful for a person to offer or sell a security in this state unless:

(a) The security is a federal covered security;

(b) The security, transaction or offer is exempted from registration under sections 30-14-201 through 30-14-203, Idaho Code; or

(c) The security is registered under this chapter.

History.
I.C., § 30-14-301, as added by 2004, ch. 45, § 2, p. 169.

JUDICIAL DECISIONS

Analysis

Public offering.
Scienter.

Public Offering.

Where purchaser was an attorney licensed in California and had no knowledge of the intricacies of seller's business, the purchasers were of the class designed to be protected by the requirement of a prospectus and the sale was a public offering necessitating registration. Frachiseur v. Mountain View Irrigation Co., 100 Idaho 336, 597 P.2d 222 (1979).

Scienter.

Scienter is not required for violations of the securities registration and licensing requirements. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 301; RUSA Section 301.

1. This Section is substantively identical to the 1956 Act and RUSA except for the addition of Section 301(1), which is necessitated by the National Securities Markets Improvement Act of 1996. See Section 102(7).

2. Except for federal covered securities, exempt securities, or securities offered or sold in exempt transactions, no sale of a security may be made in this State before the security is registered. "Sale" is defined in Section 102(26); "in this State" is addressed in Section 610; and securities registration is addressed in Sections 303 through 306.

3. The Securities Act of 1933 permits certain types of offers during the "waiting period" between the filing and effectiveness of a registration statement. The exemptive provisions of Sections 202(16) and (17) operate to permit similar offers for securities that are not federal covered securities and are in the process of registration under federal or state statutes or both.

4. Notice filings and fees applicable to federal covered securities, see Section 102(7), are addressed in Section 302.

30-14-302. Notice filing. — (a) Required filing of records. With respect to a federal covered security, as defined in section 18(b)(2) of the securities act of 1933 (15 U.S.C. 77r(b)(2)), that is not otherwise exempt under sections 30-14-201 through 30-14-203, Idaho Code, a rule adopted or an order issued under this chapter may require the filing of any or all of the following records:

(1) Before the initial offer of a federal covered security in this state, all records that are part of a federal registration statement filed with the securities and exchange commission under the securities act of 1933 and a consent to service of process complying with section 30-14-611, Idaho Code, signed by the issuer and the payment of a fee of three hundred dollars ($300) for mutual funds and one hundred dollars ($100) for unit investment trusts;

(2) After the initial offer of the federal covered security in this state, all records that are part of an amendment to a federal registration statement filed with the securities and exchange commission under the securities act of 1933; and

(3) To the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this state, if the sales data are not included in records filed with the securities and exchange commission; and

(4) Each series or portfolio of an investment company offering shall be required to make a separate notice filing. Separate notice filings for classes of an investment company are not required so long as classes are used solely as a method of distinguishing payment plans within a series or portfolio.

(b) Notice filing effectiveness and renewal. A notice filing under subsection (a) of this section is effective for one (1) year commencing on the later of the notice filing or the effectiveness of the offering filed with the securities and exchange commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the securities and exchange commission that are required by rule or order under this chapter to be filed and by paying a renewal fee of three hundred dollars ($300) for mutual funds and one hundred dollars ($100) for unit investment trusts. A previously filed consent to service of process complying with section 30-14-611, Idaho Code, may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) Notice filings for federal covered securities under section 18(b)(4)(D). With respect to a security that is a federal covered security under section 18(b)(4)(D) of the securities act of 1933 (15 U.S.C. 77r(b)(4)(D)), a rule or order under this chapter may require a notice filing by or on behalf of an issuer to include a copy of form D and the payment of a fee of fifty dollars ($50.00).

(d) Stop orders. Except with respect to a federal security under section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)), if the administrator finds that there is a failure to comply with a notice or fee requirement of this section, the administrator may issue a stop order suspending the offer and sale of a federal covered security in this state. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the administrator.

History.

I.C., § 30-14-302, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 3, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, in subsection (c), updated the federal citations near the beginning and substituted "and the payment of a fee of fifty dollars ($50.00)" for "including the appendix, as promulgated by the securities and exchange commission, and a consent to service of process complying with section 30-14-611, Idaho Code, signed by the issuer not later than fifteen (15) days after the first sale of the federal covered security in this state and the payment of a fee of fifty dollars ($50.00); and the payment of a fee of fifty dollars ($50.00) for any late filing" at the end.

Federal References.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

For more on form D, referred to in subsection (c), see *http://www.sec.gov/answers/formd.htm*.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

No Prior Provision.

1. The little used "registration by notification" in the 1956 Act Section 302 or "registration by filing" in RUSA Section 302 are omitted from this Act because of the notice filing approach required by Section 18(b)(2) of the Securities Act of 1933 for federal covered securities, which, in essence, replaces the need for registration by notification.

2. For Rule 506 offerings which are addressed by Section 18(d)(4)(D) of the Securities Act of 1933, the Securities and Exchange Commission requires the filing of Form D. See Rule 503. When an issuer meets the conditions of Rule 506, Section 302(c) is intended to limit required state filings to no more than a requirement of filing a copy of Form D, including the Appendix, a consent to service of process, and a fee.

3. The definition of "filing" in Section 102(8) will permit states to receive electronic filing of records under this Section. An administrator may also accept under this Section a signed consent filed electronically with a designee of the administrator. See Section 105.

4. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[____]" in subsections (a), (b), and (c) with the phrase "a fee established by the administrator by rule". See Comment 3 to Section 410.

30-14-303. Securities registration by coordination. — (a) Registration permitted. A security for which a registration statement has been filed under the securities act of 1933 in connection with the same offering may be registered by coordination under this section.

(b) Required records. A registration statement and accompanying records under this section must contain or be accompanied by the following records in addition to the information specified in section 30-14-305, Idaho Code, and a consent to service of process complying with section 30-14-611, Idaho Code:

(1) A copy of the latest form of prospectus filed under the securities act of 1933;

(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy or description of the security that is required by any rule adopted or an order issued under this chapter;

(3) Copies of any other information or any other records filed by the issuer under the securities act of 1933 requested by the administrator; and

(4) An undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the securities and exchange commission.

(c) Conditions for effectiveness of registration statement. A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) A stop order issued pursuant to subsection (d) of this section or section 30-14-306, Idaho Code, or issued by the securities and exchange commission, is not in effect and a proceeding is not pending against the issuer under section 30-14-306, Idaho Code, and the administrator has not given written notice of deficiencies that are unresolved and that would constitute grounds for a stop order under section 30-14-306, Idaho Code; and

(2) The registration statement has been on file for at least twenty (20)

days or a shorter period provided by a rule adopted or an order issued under this chapter.

(d) Notice of federal registration statement effectiveness. The registrant shall promptly notify the administrator in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by telegram, telephone or electronic means and shall promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section, the stop order is void as of the date of its issuance.

(e) Effectiveness of registration statement. If the federal registration statement becomes effective before each of the conditions in this section is satisfied or is waived by the administrator, the registration statement is automatically effective under this chapter when all the conditions are satisfied or waived. If the registrant notifies the administrator of the date when the federal registration statement is expected to become effective, the administrator shall promptly notify the registrant by telegram, telephone or electronic means and shall promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the administrator intends the institution of a proceeding under section 30-14-306, Idaho Code. The notice by the administrator does not preclude the institution of such a proceeding.

History.

I.C., § 30-14-303, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities act of 1933, referred to in this section, is compiled as 15 USCS § 77a et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 303; RUSA Section 303.

1. Registration by coordination was one of the key innovations of the 1956 Act. As in the 1956 Act, Section 303 streamlines the content of the registration statement and the procedure by which a registration statement becomes effective, but not the substantive standards governing the effectiveness of a registration statement.

2. The phrase "in connection with the same offering" in Section 303 does not require that the federal and state registration statements be filed simultaneously or become effective simultaneously. A registration by coordination can be filed in a State after the effectiveness of the federal registration statement as long as the administrator does not conclude that the interval was too long to consider the State registration statement "the same offering."

3. Section 303 is similar to the 1956 Act except that these provisions have been modernized to include electronic filing and electronic notification. Cf. Sections 102(8), 102(25), 105. It is anticipated that this will facilitate simultaneous filing with the Securities and Exchange Commission and the

States which is consistent with the uniformity intended by this Act. Simultaneous or sequential filing could be administered through a designee similar to the current Web-CRD or in conjunction with the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system or otherwise.

4. Section 303(b) is not intended to limit the administrator to requiring only the information and records filed with the Securities and Exchange Commission.

5. Sections 303(c) through (e) describe the conditions to be satisfied to achieve effectiveness of a coordinated filing. "Price amendment" is defined in Section 102(23). The administrator retains the right to test the registration statement by the substantive standards of Section 306(a) and may issue a stop or denial order if the administrator believes any of those provisions are applicable.

30-14-304. Securities registration by qualification. — (a) Registration permitted. A security may be registered by qualification under this section.

(b) Required records. A registration statement under this section must contain the information or records specified in section 30-14-305, Idaho Code, a consent to service of process complying with section 30-14-611, Idaho Code, and, if required by rule adopted under this chapter, the following information or records unless waived by the administrator for good cause shown:

(1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five (5) years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three (3) years or proposed to be effected;

(3) With respect to persons covered by paragraph (2) of this subsection, the aggregate sum of the remuneration paid to those persons during the previous twelve (12) months and estimated to be paid during the next twelve (12) months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries and affiliates of the issuer;

(4) With respect to a person owning of record or owning beneficially, if known, ten percent (10%) or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) of this subsection other than the person's occupation;

(5) With respect to a promoter, if the issuer was organized within the previous three (3) years, the information or records specified in paragraph (2) of this subsection, any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;

(6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three (3) years or proposed to be effected; and a statement of the reasons for making the offering;
(7) The capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two (2) years or is obligated to issue its securities;
(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;
(9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;
(10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in

paragraph (2), (4), (5), (6) or (8) of this subsection and by any person that holds or will hold ten percent (10%) or more in the aggregate of those options;

(11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two (2) years, and a copy of the contract;

(12) A description of any pending litigation, action or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action or proceeding known to be contemplated by governmental authorities;

(13) A copy of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with section 30-14-202(17)(b), Idaho Code;

(14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) A signed or conformed copy of a consent of any accountant, engineer, appraiser or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public, which is used in connection with the registration statement;

(17) A balance sheet of the issuer as of a date within four (4) months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the three (3) fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three (3) years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) Any additional information or records required by a rule adopted or an order issued under this chapter.

(c) Conditions for effectiveness of registration statement. A registration statement under this section becomes effective thirty (30) days, or any shorter period provided by a rule adopted or an order issued under this chapter, after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) A stop order is not in effect and a proceeding is not pending under section 30-14-306, Idaho Code;

(2) The administrator has not issued an order under section 30-14-306, Idaho Code, delaying effectiveness; and

(3) The applicant or registrant has not requested that effectiveness be delayed.

(d) Delay of effectiveness of registration statement. The administrator may delay effectiveness once for not more than ninety (90) days if the administrator determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The administrator may also delay effectiveness for a further period of not more than thirty (30) days if the administrator determines that the delay is necessary or appropriate.

(e) Prospectus distribution may be required. A rule adopted or an order issued under this chapter may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) of this section be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

(1) The first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) The confirmation of a sale made by or for the account of the person;

(3) Payment pursuant to such a sale; or

(4) Delivery of the security pursuant to such a sale.

History.

I.C., § 30-14-304, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 304; RUSA Section 304.

1. This Section generally follows the 1956 Act and RUSA. Any security may be registered by qualification, whether or not another type of registration is available. Ordinarily, however, registration by qualification will only be used by an issuer when no other procedure is available.

2. Section 304(b) originally was modeled on Schedule A of the Securities Act of 1933.

3. In Section 304(b)(12) pending litigation can include litigation that has not yet been filed.

4. Section 304(b)(17) uses the same terminology as is used currently in Regulation S-X of the Securities and Exchange Commission. Under Sections 605(a) and (c) the administrator is authorized to specify the form and content of rules and forms governing registration statements and the form and content of financial statements required under this Act.

5. Under Sections 304(b)(18) and 307 the administrator may require additional information or may waive in whole or in part or condition any of the requirements of Section 304(b). Section 304(b)(18), for example, would authorize the administrator to require that a report by an accountant, engineer, appraiser or other professional person be filed. Section 304(b)(18) would also authorize that securities of designated classes under a trust indenture contain additional specified information.

30-14-305. Securities registration filings. — (a) Who may file. A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) Filing fee. A person filing a registration statement shall pay a filing fee

of three hundred dollars ($300). If a registration statement is withdrawn before the effective date or a pre-effective stop order is issued under section 30-14-306, Idaho Code, the administrator shall retain the fee.

(c) Status of offering. A registration statement filed under section 30-14-303 or 30-14-304, Idaho Code, must specify:

(1) The amount of securities to be offered in this state;

(2) The states in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) Any adverse order, judgment or decree issued in connection with the offering by a state securities regulator, the securities and exchange commission, or a court.

(d) Incorporation by reference. A record filed under this chapter or the predecessor act within five (5) years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) Nonissuer distribution. In the case of a nonissuer distribution, information or a record may not be required under subsection (i) of this section or section 30-14-304, Idaho Code, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) Escrow and impoundment. A rule adopted or an order issued under this chapter may require as a condition of registration that a security issued within the previous five (5) years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this state be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by a rule adopted or an order issued under this chapter, provided however that the administrator may not reject a depository institution solely because of its location in another state.

(g) Form of subscription. A rule adopted or an order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than five (5) years.

(h) Effective period. Except while a stop order is in effect under section 30-14-306, Idaho Code, a registration statement is effective for one (1) year after its effective date, or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. A registration statement remains effective for each additional year by filing a renewal as prescribed

by a rule adopted or an order issued under this chapter. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one (1) year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

(i) Periodic reports. While a registration statement is effective, a rule adopted or an order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

(j) Posteffective amendments. A registration statement shall be amended after its effective date if there are material changes in information or documents in the registration statement. The posteffective amendment becomes effective when the administrator so orders.

History.
I.C., § 30-14-305, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
For more on securities and exchange commission, see *http://www.sec.gov*.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 305; RUSA Section 305.

1. Section 305 generally follows the 1956 Act and RUSA except that earlier provisions in both Acts referring to Investment Company Act of 1940 securities, which are federal covered securities, see Section 102(7), have been deleted.

2. Section 305 is applicable both to registration by coordination, see Section 303, and to registration by qualification, see Section 304.

3. Section 305(a) expressly authorizes registration by "a person on whose behalf the offering is to be made." This would permit a nonissuer, cf. Section 102(18), or a broker-dealer to file a registration statement independent of the issuer.

4. This Act is intended, to the extent practicable, to be revenue neutral in its impact on existing state law, see Comment 3 to Section 608. Accordingly, Section 305(b) does not specify what fees states should provide. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[_____]" in subsections (b) and (j) with the phrase "a fee established by the administrator by rule pursuant to the [state administrative procedure act]" and replace the phrase "$[_____] of the fee" in subsection (b) with the phrase "an amount of the fee established by the administrator by rule". See Comment 3 to Section 410.

5. Section 305(c), which generally follows the 1956 Act and RUSA, does not require in Section 305(c)(3) disclosure of an order permitting the withdrawal of a registration statement. The administrator may, however, require disclosure of this information in a registration by qualification under Section 304(b)(18).

6. Section 305(c), like every other provision concerned with the content of the registration statement, must be read with Section 306(a)(1) which judges the accuracy and completeness of the registration statement as of its effective date unless an order denying effectiveness had been entered before the effective date. A registration statement must be kept current with changing developments until the effectiveness date, but a registration statement is not required to be amended after the effective date except to correct inaccuracies or deficiencies which existed as of the effective date. An administrator, however,

separately may require under Section 305(i) or (j) periodic reports or amendments to keep reasonably current the information contained in the registration statement.

7. Under Section 305(d) incorporation by reference is permitted as a matter of administrative practice.

8. Section 305(e) is the substantive equivalent to provisions in the 1956 Act and RUSA. This subsection is designed to address nonissuer offerings where the seller cannot obtain certified financial statements and other normally required records. The phrase "without unreasonable effort or expense" originated in Section 10(a)(3) of the Securities Act of 1933. It is not meant to apply to expenses incidental to supplying required information required for registration in the case of a nonissuer distribution by a person in a control relationship with the issuer or otherwise having access to or contractual rights to obtain the required information. Section 305(e) applies only to registration by qualification under Section 304 and periodic reports for either registration by coordination or registration by qualification under Section 305(i).

9. Section 305(f), follows the 1956 Act and RUSA, and authorizes the administrator to require the impoundment of funds until the issuer receives a specified amount from the sale of the security in this State or elsewhere and to require the escrow of promotional stock until specific conditions are met. This Section is limited to a security issued within the past five years or to be issued to a promoter for a consideration substantially different from the public offering price or to a person for a consideration other than cash. The typical distribution subject to Section 305(f) will be a relatively new promotional or speculative offering. Section 305(f) follows the 1956 Act and RUSA and provides that the administrator may not reject a depository solely because of its location in another state. Unlike the statute in *Schwaemmle Const. Co. v. Michigan Dep't of Commerce*, 360 N.W.2d 141 (Mich. 1984), Section 305(f) broadly provides that the administrator "may determine the conditions of any escrow or impoundment under this subsection." As in *Schwaemmle,* this power will operate only until the impounded funds or escrowed shares are released.

10. Section 305(g) follows the 1956 Act in authorizing the administrator to specify the form of a subscription or sale contract.

11. Section 305(h) generally follows the 1956 Act and RUSA. The term "nonissuer transaction" or "nonissuer distribution" is defined in Section 102(18). A sale by a nonissuer would have to be registered under Section 301 unless it is exempted or involves a federal covered security. Section 202(1) exempts "isolated nonissuer transactions." When a nonissuer transaction is not exempt under Section 202(1), it may still be exempted under other transaction exemptions.

If no exemption is available for a nonissuer distribution, and it does not involve a federal covered security, the security must be registered under Article 3. Under the first sentence of Section 305(h) each registration statement remains effective for at least one year and for any longer period the administrator may determine. However, no registration statement is effective while a stop order with respect to it is in effect under Section 306.

For the purposes of a nonissuer transaction, all outstanding securities of the same class as a registered security are considered to be registered as long as the registration statement remains effective. This means that during the effective period of a registration statement under this Act all outstanding securities of the same class can be traded by anyone, including nonissuers, as if they were registered.

Section 305(h) also provides that, unless the administrator determines otherwise, a registration statement cannot be withdrawn until one year after its effective date if any securities of the same class are outstanding. This is designed to protect sellers who would be unaware of a withdrawal from being subject to civil liability.

12. Section 305(j) follows RUSA and a procedure limited to investment companies in the 1956 Act in allowing posteffective date amendments. Under Section 305(j), when a posteffective amendment increases the number of securities to be offered or sold, an additional registration fee is required.

30-14-306. Denial, suspension, and revocation of securities registration. — (a) Stop orders. The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the administrator finds that the order is in the public interest and that:

(1) Any of the following is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact:

(A) The registration statement as of its effective date, or before the effective date in the case of an order denying effectiveness;

(B) A posteffective amendment under section 30-14-305(j), Idaho Code, as of its effective date; or

(C) A periodic report under section 30-14-305(i), Idaho Code;

(2) This chapter or a rule adopted or an order issued under this chapter, or a condition imposed under this chapter, has been willfully violated in connection with the offering, by: the person filing the registration statement; the issuer, a partner, officer or director of the issuer or a person having a similar status or performing a similar function; a promoter of the issuer; or a person directly or indirectly controlling or controlled by the issuer; but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign or state law other than this chapter applicable to the offering, provided however the administrator may not institute a proceeding against an effective registration statement under this paragraph more than one (1) year after the date of the order or injunction on which it is based, and the administrator may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this section;

(4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) With respect to a security sought to be registered under section 30-14-303, Idaho Code, there has been a failure to comply with the undertaking required by section 30-14-303(b)(4), Idaho Code;

(6) The applicant or registrant has not paid the filing fee, provided however the administrator shall void the order if the deficiency is corrected; or

(7) The offering:

(A) Will work or tend to work a fraud upon purchasers or would so operate;

(B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options; or

(C) Is being made on terms that are unfair, unjust or inequitable.

(b) Enforcement. To the extent practicable, the administrator by a rule adopted or an order issued under this chapter shall publish standards that provide notice of conduct that violates subsection (a)(7) of this section.

(c) Institution of stop order. The administrator may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within thirty (30) days after the registration statement became effective.

(d) Summary process. The administrator may summarily revoke, deny, postpone or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection (e) of this section that the order has been issued, the reasons for the revocation, denial, postponement or suspension, and that within fifteen (15) days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within thirty (30) days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and an opportunity for a hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) Procedural requirements for stop order. A stop order may not be issued under this section without:

(1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) An opportunity for a hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with chapter 52, title 67, Idaho Code.

(f) Modification or vacation of stop order. The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

History.

I.C., § 30-14-306, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 306; RUSA Section 306.

1. This Section generally follows the 1956 Act and RUSA and applies to both registration by coordination under Section 303 and registration by qualification under Section 304.

2. Section 306(a)(1) follows the 1956 Act and RUSA in testing in a suspension or revocation proceeding the completeness and accuracy of a registration statement as of the registration statement's effective date. A registration statement that becomes misleading because of a development that occurs after its effective date is not a ground for the issuance of a stop order under Section 306(a)(1). An administrator, however, may require periodic reports under Section 305(i) or a posteffective amendment under Section 305(j). With respect to periodic reports under Section 305(i), a misleading report would be the basis of a stop order under Section 306(a)(1) if it is materially inaccurate as of the date it was filed.

3. On the meaning of "willfully," see Comment 2 under Section 508.

4. A violation by an issuer has the same consequences whether the issuer has filed a registration statement or has had a broker-dealer file it. But this is not the case when the registration statement is filed by a broker-dealer acting independently.

5. The verb "is" at the beginning of Section 306(a)(3) means that a stop order or injunction that has expired or been vacated is not the ground for action under this paragraph.

6. Section 306(a)(4) applies to activity that is conducted in a State where that activity is illegal. It does not apply if the activity is not illegal under that State's law. This paragraph is not meant to apply to activity which is lawful where conducted but would be illegal if conducted in the State where the registration statement is filed.

7. Sections 306(a)(5) and (6) follow the 1956 Act and RUSA.

8. Sections 306(a)(7) and (b) address merit regulation. Sections 306(E) and (F) of the 1956 Act authorized a stop order when an "offering has worked or tended to work a fraud upon purchasers or would so operate" or "the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options." By 1985 a majority of states which had adopted the 1956 Act had adopted this approach to merit regulation rather than the earlier and broader "unfair, unjust or inequitable" standard that then applied in a minority of States.

RUSA Sections 306(a)(5) and (6) adopted provisions substantively identical to the 1956 Act and included in brackets an "unfair, unjust, or inequitable" alternative.

The National Securities Markets Improvement Act of 1996 subsequently preempted merit regulation of federal covered securities. See Section 102(7).

Sections 306(a)(7) and (b) take a different approach. Subject to the National Securities Markets Improvement Act of 1996, merit standards are retained but hortatory paragraph 306(b) encourages the administrator, to the extent practicable, to adopt, by rule or order, standards that provide notice to issuers of a state's merit standards. Notice will address one criticism of merit regulation. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 111-124 (3d ed. rev. 1998). Statements of Policy of the North American Securities Administrator Association that have been adopted by a state would provide notice in compliance with Section 306(b). Similarly other state rules or orders could be adopted in the future to address new types of securities as they occur.

An order under Section 306(b) can be adopted after a securities registration statement has been filed. Under Section 306(b) an administrator, by rule or order, for example, could adopt a standard that would provide the basis for a stop order denying effectiveness to a development stage company that has no specific business purpose or plan or has indicated that its primary business plan is to engage in a merger or acquisition with an unidentified company, entity, or person. "Blank check offerings" are subject to Rule 419 adopted under the Securities Act of 1933. See Comment 3 to Section 202.

9. Section 306(c) follows the 1956 Act and RUSA and allows an administrator up to 30 days after a registration statement becomes effective to institute a stop order proceeding on the basis of a fact or transaction known when the registration statement became effective. This is to avoid the necessity of an administrator issuing a stop order prematurely.

10. Sections 306(d) and (e) assure each person subject to a stop order of notice, opportunity for a hearing, and findings of fact and conclusions of law contained in a record.

11. An administrator must consider the public interest when issuing a stop order and may under Section 306(f) consider the public interest when modifying or vacating a stop order. See, e.g., *TechnoMedical Lab., Inc. v. Utah Sec. Div.*, 744 P.2d 320, 324-325 (Utah Ct. App. 1987) (a state has a valid public interest in stopping the issuance of hundreds of thousands of public shares that did not comply with the disclosure requirements of securities registration); cf. stop orders under the Securities Act of 1933, see 1 Louis Loss & Joel Seligman, Securities Regulation 576-589 (3d ed. rev. 1998).

12. As of September 2002 46 jurisdictions had adopted a form of Section 306(a)(7)(A) ("will tend to work a fraud or would so operate"); 34 jurisdictions had adopted a form of Section 306(a)(7)(B) ("unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoter profits or participations, or unreasonable amounts or kinds of options"); and 16 jurisdictions had adopted a form of bracketed Section 306(a)(7)(C) ("terms that are unfair, unjust, or inequitable").

30-14-307. Waiver and modification. — The administrator may waive or modify, in whole or in part, any or all of the requirements of sections 30-14-302, 30-14-303 and 30-14-304(b), Idaho Code, or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to section 30-14-305(i), Idaho Code.

History.

I.C., § 30-14-307, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provision: RUSA Section 303(h). Section 307 follows RUSA Section 303(h) and empowers the administrator to waive or modify any of the requirements of 302, 303, 304(b), or the requirement of any information or record in a registration statement. An example would be the expedited procedure several states have adopted to coordinate with shelf registration under Rule 415 of the Securities Act of 1933. In waiving or modifying requirements the administrator must make a finding satisfying the requirements of Section 605(b).

PART 4. BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES, AND FEDERAL COVERED INVESTMENT ADVISERS

30-14-401. Broker-dealer registration requirement and exemptions. — (a) Registration requirement. It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d) of this section.

(b) Exemptions from registration. The following persons are exempt from the registration requirement of subsection (a) of this section:

(1) A broker-dealer without a place of business in this state if its only transactions effected in this state are with:

(A) The issuer of the securities involved in the transactions;

(B) A broker-dealer registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;

(C) An institutional investor;

(D) A nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting for the account of others pursuant to discretionary authority in a signed record;

(E) A bona fide preexisting customer whose principal place of residence is not in this state and the person is registered as a broker-dealer under the securities exchange act of 1934 or is not required to be registered under the securities exchange act of 1934 and is registered under the securities act of the state in which the customer maintains a principal place of residence;

(F) A bona fide preexisting customer whose principal place of residence is in this state but who was not present in this state when the customer relationship was established, if:

(i) The broker-dealer is registered under the securities exchange act of 1934 or is not required to be registered under the securities exchange act of 1934 and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(ii) Within forty-five (45) days after the customer's first transaction in this state, the person files an application for registration as a broker-dealer in this state and a further transaction is not effected more than seventy-five (75) days after the date on which the application is filed or, if earlier, the date on which the administrator notifies the person that the administrator has denied the application

for registration or has stayed the pendency of the application for good cause;

(G) Not more than three (3) customers in this state during the previous twelve (12) months, in addition to those customers specified in subsections (b)(1)(A) through (b)(1)(F) and subsection (b)(1)(H) of this section, if the broker-dealer is registered under the securities exchange act of 1934 or not required to be registered under the securities exchange act of 1934 and is registered under the securities act of the state in which the broker-dealer has its principal place of business; and

(H) Any other person exempted by a rule adopted or an order issued under this chapter; and

(2) A person that deals solely in United States government securities and is supervised as a dealer in government securities by the board of governors of the federal reserve system, the comptroller of the currency, the federal deposit insurance corporation, or the office of thrift supervision.

(c) Limits on employment or association. It is unlawful for a broker-dealer, or for an issuer engaged in offering, offering to purchase, purchasing, or selling securities in this state, directly or indirectly, to employ or associate with an individual to engage in an activity related to securities transactions in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser, or a federal covered investment adviser by an order of the securities regulator of a state, the securities and exchange commission, or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation or bar. Upon request from a broker-dealer or issuer and for good cause, an order under this chapter may modify or waive, in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

(d) Foreign transactions. A rule adopted or an order issued under this chapter may permit:

(1) A broker-dealer that is registered in Canada or other foreign jurisdiction and that does not have a place of business in this state to effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by:

(A) An individual from Canada or other foreign jurisdiction who is temporarily present in this state and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(B) An individual from Canada or other foreign jurisdiction who is present in this state and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(C) An individual who is present in this state, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

(2) An agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this state as permitted for a broker-dealer described in subsection (b)(1) [paragraph (1)] of this subsection.

History.

I.C., § 30-14-401, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The "securities exchange act of 1934", referred to throughout subsection (b)(1) of this section, is compiled as 15 U.S.C.S. §§ 77b to 77e, 77j, 77k, 77m, 77o, 77s, 78a to 78o, 78o-3, and 78p to 78hh.

The office of thrift supervision, referred to in paragraph (b)(2), was merged into the office of the comptroller of the currency and ceased to exist on October 19, 2011, pursuant to 12 U.S.C.S. § 5412.

Compiler's Notes.

For more on board of governors of the federal reserve system, see *http://www.federalreserve.gov/*.

For more on comptroller of the currency, see *http://www.occ.treas.gov/*.

For more on federal deposit insurance corporation, see *http://www.fdic.gov/*.

The bracketed insertion in paragraph (d)(2) was added by the compiler to correct the statutory reference and to conform to the uniform act.

JUDICIAL DECISIONS

Violations of Registration and Licensing Requirements.

Scienter is not required for violations of the securities registration and licensing requirements; therefore, because defendant's racketeering charge was predicated on twenty-three counts of violating those requirements, strict liability provision, good faith reliance on legal counsel is not a defense. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 201; RUSA Sections 201 — 202.

1. "Broker-dealer" is defined in Section 102(4). The scope of the Section 401(a) reference "to transact business in this State" is specified in Section 610. "Transacts a business" has been held to mean "more than a trivial or *de minimis* business." *United States v. Schwartz*, 464 F.2d 499, 506 (2d Cir. 1972), *cert. denied,* 409 U.S. 1009 (1972).

2. Under Section 401(a) a person can be required to register as a securities broker-dealer only if the person transacts business in securities. See, e.g., *AMR Realty Co. v. State*, 373 A.2d 1002 (N.J. Supr. Ct. App. Div. 1977) (requirement that the transactions involve securities).

3. "Bona fide" is a much construed term particularly in the U.C.C. context. See, e.g., *MCC Proceeds, Inc. v. Advest, Inc.*, 743 N.Y.S.2d 1 (N.Y. A.D. 2002) (comparing bona fide to good faith standard).

4. Section 401(b)(1)(D) was added to provide relief in situations where a broker-dealer is accepting orders from a sophisticated financial professional who is making the investment decisions for its customers.

5. Under 401(b)(1)(E) and (F) preexisting customers must be bona fide. A principal place of residence, for example, normally would be the residence where the customer spends a majority of time. These exemptions were intended to facilitate ongoing broker-customer relationships with customers who have established a second or other residence for such purposes as a winter home (i.e. "snowbirds").

6. Section 401(c) prohibits a broker-dealer or issuer from employing or associating with an individual in a capacity for which that individual has been suspended by the administrator. Violation of this provision does not result in strict liability. In order for a broker-dealer or issuer to be liable, the broker-dealer or issuer must have known or should have known of the administrator's order to the individual suspended or barred. Cf. Comment 17 to Section 412.

7. Section 401(d) recognizes the increas-

ingly transnational nature of securities brokerage and permits, if the administrator adopts a rule or order, transactions by a Canadian or a foreign broker-dealer with a person from Canada or other foreign jurisdiction who is resident in this State. This subsection is not self-executing and is effective only if the administrator adopts a rule or order.

8. To give effect to action taken by rule or order under Section 401(d), there must be a transaction registration exemption that will enable securities transactions to take place in customer accounts involving the broker-dealers and agents contemplated in Section 401(d). See Sections 202 and 203.

30-14-402. Agent registration requirement and exemptions. — (a) Registration requirement. It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this section.

(b) Exemptions from registration. The following individuals are exempt from the registration requirement of subsection (a) of this section:

(1) An individual who represents a broker-dealer in effecting transactions in this state limited to those described in section 15(h)(2) of the securities exchange act of 1934 (15 U.S.C. 78o(h)(2));

(2) An individual who represents a broker-dealer that is exempt under section 30-14-401(b) or (d), Idaho Code;

(3) An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries, and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(4) An individual who represents an issuer and who effects transactions in the issuer's securities exempted by section 30-14-202, Idaho Code, other than section 30-14-202(14), Idaho Code;

(5) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, provided however that an individual who effects transactions in a federal covered security under section 18(b)(3) or 18(b)(4)(D) of the securities act of 1933 (15 U.S.C. 77r(b)(3) or 77r(b)(4)(D)) is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(6) An individual who represents a broker-dealer registered in this state under section 30-14-401(a), Idaho Code, or exempt from registration under section 30-14-401(b), Idaho Code, in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting for the account of others pursuant to discretionary authority in a signed record;

(7) An individual who represents an issuer in connection with the purchase of the issuer's own securities;

(8) An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

(9) Any other individual exempted by a rule adopted or an order issued under this chapter.

(c) Registration effective only while employed or associated. The registration of an agent is effective only while the agent is employed by or associated with a broker-dealer registered under this chapter or an issuer that is offering, selling or purchasing its securities in this state.

(d) Limit on employment or association. It is unlawful for a broker-dealer, or an issuer engaged in offering, selling or purchasing securities in this state, to employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection (a) of this section or is exempt from registration under subsection (b) of this section.

(e) Limit on affiliations. Unless prohibited by a rule adopted or an order issued under this chapter, an individual may act as an agent for more than one (1) broker-dealer or one (1) issuer at a time.

History.

I.C., § 30-14-402, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 4, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, updated several federal references throughout the section and substituted "section 30-14-202(14)" for "sections 30-14-202(11) and 30-14-202(14)" in paragraph (b)(4).

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Prior Provisions: RUSA Sections 201 — 202.

1. "Agent" is defined in Section 102(2). The scope of the Section 402(a) reference to "transact business in this State" is specified in Section 610. An administrator may by rule or order take action under Section 401(d)(2) to address an agent.

2. An independent contractor must be either a broker-dealer or an agent if the individual transacts business as a broker-dealer or agent. There is no other status permitted under this Act for securities activities.

3. A broker-dealer in violation of Section 402(a) may be disciplined under Section 412 and be subject to a civil or administrative enforcement action under Section 603 or 604.

4. Under Sections 402(b)(3) and (5) an agent may be exempt if acting for an issuer and receiving compensation (for example, as a corporate executive), as long as the compensation is not a commission or other remuneration based on transactions in the issuer's own securities. Such an agent could receive a salary with conventional benefits, including an annual bonus (related to his or her performance) as an executive, and still be within this exemption unless the agent is also being compensated directly or indirectly for participation in the specified securities transactions.

5. Section 402(b)(6) was added to provide relief in situations where an agent is accepting orders from a sophisticated financial professional who is making the investment decisions for its customers.

6. Ministerial or clerical acts in Section 402(b)(8) might include preparing routine written communications or responding to inquiries.

7. Section 402(e) limits agents to a single employment or affiliation unless a rule or order of the administrator authorizes multiple affiliations. In any event an agent must be registered, see Section 402(a), or exempt from registration, see Section 402(b). Registration is effective only while an agent is employed by or associated with a broker-dealer or an issuer. See Section 402(c).

30-14-403. Investment adviser registration requirement and exemptions. — (a) Registration requirement. It is unlawful for a person to

transact business in this state as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser under subsection (b) of this section.

(b) Exemptions from registration. The following persons are exempt from the registration requirement of subsection (a) of this section:

(1) A person without a place of business in this state that is registered under the securities act of the state in which the person has its principal place of business if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, or broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state if the investment adviser is registered under the securities act of the state in which the clients maintain principal places of residence; or

(D) Any other client exempted by a rule adopted or an order issued under this chapter;

(2) A person without a place of business in this state if the person has had, during the preceding twelve (12) months, not more than five (5) clients that are resident in this state in addition to those specified under subsection (b)(1) of this section;

(3) A federal covered investment adviser; or

(4) Any other person exempted by a rule adopted or an order issued under this chapter.

(c) Limits on employment or association. It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser, or broker-dealer by an order under this chapter, the securities and exchange commission, or a self-regulatory organization, unless the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation or bar. Upon request from the investment adviser and for good cause, the administrator, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

(d) Investment adviser representative registration required. It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this chapter as an investment adviser representative who transacts business in this state on behalf of the investment adviser unless the individual is registered under section 30-14-404(a), Idaho Code, or is exempt from registration under section 30-14-404(b), Idaho Code.

History.

I.C., § 30-14-403, as added by 2004, ch. 45, § 2, p. 169.

JUDICIAL DECISIONS

Federal Law.

The provisions of 15 U.S.C. § 80b-1 do not have the effect of invalidating this section which requires registration of investment advisers. Kinsela v. State, Dep't of Fin., 117 Idaho 632, 790 P.2d 1388 (1990).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 201; RUSA Sections 203-204.

1. "Investment adviser" is defined in Section 102(15). The scope of the Section 403(a) reference to "transact business in this State" is specified in Section 610.

2. Excluded from the definition of investment adviser in Section 102(15)(C) is a broker-dealer who receives no special compensation for investment advisory services. Such a broker-dealer would not have to register as both a broker-dealer and investment adviser in this State. A broker-dealer that does receive special compensation, on the other hand, would also meet the statutory definition of investment adviser and would be required to register in both capacities.

3. Section 403(b)(2) is consistent with the National Securities Markets Improvement Act of 1996 which prohibits a State from regulating an investment adviser that does not have a place of business in this State and had fewer than six clients who were state residents during the preceding 12 months.

4. Section 403(c) prohibits an investment adviser from employing an individual who is prohibited from such employment or association by the administrator. Violation of this provision does not result in strict liability. To be liable the investment adviser must have known or should have known of the administrator's order to the individual suspended or barred.

30-14-404. Investment adviser representative registration requirement and exemptions. — (a) Registration requirement. It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser representative under subsection (b) of this section.

(b) Exemptions from registration. The following individuals are exempt from the registration requirement of subsection (a) of this section:

(1) An individual who is employed by or associated with an investment adviser that is exempt from registration under section 30-14-403(b), Idaho Code, unless the individual has a place of business in this state or is not an investment adviser representative as defined by this chapter; and

(2) Any other individual exempted by a rule adopted or an order issued under this chapter.

(c) Registration effective only while employed or associated. The registration of an investment adviser representative is not effective while the investment adviser representative is not employed by or associated with an investment adviser registered under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under section 30-14-405, Idaho Code.

(d) Limit on affiliations. An individual may transact business as an investment adviser representative for more than one (1) investment adviser or federal covered investment adviser unless a rule adopted or an order issued under this chapter prohibits or limits an individual from acting as an investment adviser representative for more than one (1) investment adviser or federal covered investment adviser.

(e) Limits on employment or association. It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to

conduct business in this state on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser representative is suspended or revoked or the individual is barred or enjoined from employment or association with an investment adviser or a federal covered investment adviser by an order under this chapter, the securities and exchange commission, or a self-regulatory organization, or a court of competent jurisdiction. Upon request from a federal covered investment adviser and for good cause, the administrator, by order issued, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

(f) Referral fees. An investment adviser registered under this chapter, a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code, or a broker-dealer registered under this chapter, is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this chapter, a federal covered investment adviser who has filed a notice under section 30-14-405, Idaho Code, or a broker-dealer registered under this chapter with which the individual is employed or associated as an investment adviser representative.

History.

I.C., § 30-14-404, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

No Prior Provision.

1. "Investment adviser representative" is defined in Section 102(16). The scope of the Section 404(a) reference to "transacts business in this State" is specified in Section 610.

2. Neither the 1956 Act nor RUSA provided for the registration of investment adviser representatives. In recent years, however, the states increasingly have done so.

3. Under this Act a sole practitioner may register as an investment adviser. See Section 403. The Investment Adviser Registration Depository currently provides for entry of the legal name of the individual as the investment adviser and the entry of any name the individual is doing business under that is different from the individual's name. A sole practitioner is not required to register under Section 404 as an investment adviser representative, unless the administrator requires such registration.

4. Section 404(e) prohibits an investment adviser representative from association with a federal covered investment adviser when such association is prohibited by an order of the administrator. Unlike similar provisions in Sections 401 and 403, there is no culpability requirement that the investment adviser representative' "knows or in the exercise of reasonable care should have known" of a suspension or bar because the order should be received by the investment adviser representative. As with Sections 401 and 403, the administrator may waive this prohibition. Cf. Comment 17 to Section 412.

5. The administrator may adopt rules or orders under Section 404(f) in accordance with Section 605. The Securities and Exchange Commission has adopted a rule that addresses referral fees in Rule 206(4)-3 of the Investment Advisers Act of 1940.

6. For a state that intends to extend Section 404(f) to those broker-dealers and investment advisers who are not required to register and those federal covered investment advisers not required to file a notice, this subsection should read:

(f) [*Referral Fees.*] An investment adviser registered under this [Act], a federal covered investment adviser that has filed a notice under Section 405, or a broker-dealer registered under this [Act] is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this [Act], or not required to register under this [Act], a federal covered investment who

has filed a notice under Section 405 or is not required to file a notice under Section 405, or a broker-dealer registered under this [Act] or not required to register under this [Act] with which the individual is employed or associated as an investment adviser representative.

30-14-405. Federal covered investment adviser notice filing requirement. — (a) Notice filing requirement. Except with respect to a federal covered investment adviser described in subsection (b) of this section, it is unlawful for a federal covered investment adviser to transact business in this state as a federal covered investment adviser unless the federal covered investment adviser complies with subsection (c) of this section.

(b) Notice filing requirement not required. The following federal covered investment advisers are not required to comply with subsection (c) of this section:

(1) A federal covered investment adviser without a place of business in this state if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state; or

(D) Other clients specified by a rule adopted or an order issued under this chapter;

(2) A federal covered investment adviser without a place of business in this state if the person has had, during the preceding twelve (12) months, not more than five (5) clients that are resident in this state in addition to those specified under subsection (b)(1) of this section; and

(3) Any other person excluded by a rule adopted or an order issued under this chapter.

(c) Notice filing procedure. A person acting as a federal covered investment adviser, not excluded under subsection (b) of this section, shall file a notice, a consent to service of process complying with section 30-14-611, Idaho Code, and such records as have been filed with the securities and exchange commission under the investment advisers act of 1940 required by a rule adopted or an order issued under this chapter and pay the fees specified in section 30-14-410(e), Idaho Code.

(d) Effectiveness of filing. The notice under subsection (c) of this section becomes effective upon its filing and expires on December thirty-first of each year unless renewed.

History.

I.C., § 30-14-405, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The investment advisers act of 1940, referred to in subsection (c), is codified as 15 USCS § 80b-1 et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov.*

OFFICIAL COMMENT

No Prior Provision.

1. "Federal covered investment adviser" is defined in Section 102(6). The scope of the Section 405(a) reference to "transacts business in this State" is specified in Section 610.

2. Section 405(b)(2) is necessitated by the National Securities Markets Improvement Act of 1996 and is intended to coordinate this Act with the Investment Advisers Act of 1940.

3. Section 404(c) provides limits on those who can be employed by or associated with a federal covered investment adviser.

4. The succession provision of Section 407(a) is available to a federal covered investment adviser who has filed a notice under Section 405.

30-14-406. Registration by broker-dealer, agent, investment adviser, and investment adviser representative. — (a) Application for initial registration. A person shall register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with section 30-14-611, Idaho Code, and paying the fee specified in section 30-14-410, Idaho Code, and any reasonable fees charged by the designee of the administrator for processing the filing. The application must contain:

(1) The information or record required for the filing of a uniform application; and

(2) Upon request by the administrator, any other financial or other information or record that the administrator determines is appropriate.

(b) Amendment. If the information or record contained in an application filed under subsection (a) of this section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Effectiveness of registration. If an order is not in effect and a proceeding is not pending under section 30-14-412, Idaho Code, registration becomes effective at noon on the forty-fifth day after a completed application is filed, unless the registration is denied. A rule adopted or an order issued under this chapter may set an earlier effective date or may defer the effective date until noon on the forty-fifth day after the filing of any amendment completing the application.

(d) Registration renewal. A registration is effective until midnight on December thirty-first of the year for which the application for registration is filed. Unless an order is in effect under section 30-14-412, Idaho Code, a registration may be automatically renewed each year by filing such records as are required by a rule adopted or an order issued under this chapter, by paying the fee specified in section 30-14-410, Idaho Code, and by paying costs charged by the designee of the administrator for processing the filings.

(e) Additional conditions or waivers. A rule adopted or an order issued under this chapter may impose such other conditions, not inconsistent with the national securities markets improvement act of 1996 (110 Stat. 3416). An order issued under this chapter may waive, in whole or in part, specific requirements in connection with registration as are in the public interest and for the protection of investors.

History.
I.C., § 30-14-406, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.
The national securities market improvement act of 1996 is Public Law 104-290, enacted October 11, 1996, which is generally codified throughout Title 15 of the United States Code.

Compiler's Notes.
The words enclosed in parentheses so appeared in the law as enacted.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 202; RUSA Sections 205, 208.

1. Under Section 406(a), the administrator is authorized to accept standardized forms such as Form B-D for broker-dealers; Form U-4 for agents and investment adviser representatives; and Form ADV for investment advisers, which are filed today through such designees as the Web-CRD or the Investment Adviser Registration Depository (IARD). While this Act generally encourages uniformity, Sections 406(a) and (e) are intended to give the administrator authority to augment or waive disclosure requirements in appropriate cases.

2. Section 406(a) eliminates the listing of specified information delineated in Section 202 of the 1956 Act. As with RUSA Section 205, the intent is to facilitate coordination with widely used standardized forms.

3. Under this Act a single person may act both as an agent and investment adviser representative if the person satisfies applicable registration requirements to be both an agent and investment adviser representative.

30-14-407. Succession and change in registration of broker-dealer or investment adviser. — (a) Succession. A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for registration pursuant to section 30-14-401 or 30-14-403, Idaho Code, or a notice pursuant to section 30-14-405, Idaho Code, for the unexpired portion of the current registration or notice filing.

(b) Organizational change. A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the registrant in its filing. The new organization is a successor to the original registrant for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for registration. A predecessor registered under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser registration within forty-five (45) days after filing its amendment to effect succession.

(c) Name change. A broker-dealer or investment adviser that changes its name may continue its registration by filing an amendment to its registra-

tion. The amendment becomes effective when filed or on a date designated by the registrant.

(d) Change of control. A change of control of a broker-dealer or investment adviser may be made in accordance with a rule adopted or an order issued under this chapter.

History.
I.C., § 30-14-407, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 202(c); RUSA 210.

1. Section 407 is intended to avoid unnecessary interruptions of business by specifying procedures for a successor broker-dealer or investment adviser; a broker-dealer or investment adviser to maintain its registration if it changes its form of organization or name; or, in accordance with a rule or order adopted under this Act, a change of control of a broker-dealer or investment adviser.

2. There is no filing fee under Section 407.

30-14-408. Termination of employment or association of agent and investment adviser representative and transfer of employment or association. — (a) Notice of termination. If an agent registered under this chapter terminates employment by or association with a broker-dealer or issuer, or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser or federal covered investment adviser, or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser, or federal covered investment adviser shall promptly file a notice of termination. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant may do so.

(b) Transfer of employment or association. If an agent registered under this chapter terminates employment by or association with a broker-dealer registered under this chapter and begins employment by or association with another broker-dealer registered under this chapter; or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code, and begins employment by or association with another investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code; then upon the filing by or on behalf of the registrant, within thirty (30) days after the termination, of an application for registration that complies with the requirement of section 30-14-406(a), Idaho Code, and payment of the filing fee required under section 30-14-410, Idaho Code, the registration of the agent or investment adviser representative is:

(1) Immediately effective as of the date of the completed filing, if the agent's central registration depository record or successor record or the investment adviser representative's investment adviser registration de-

pository record or successor record does not contain a new or amended disciplinary disclosure within the previous twelve (12) months; or

(2) Temporarily effective as of the date of the completed filing, if the agent's central registration depository record or successor record or the investment adviser representative's investment adviser registration depository record or successor record contains a new or amended disciplinary disclosure within the preceding twelve (12) months.

(c) Withdrawal of temporary registration. The administrator may withdraw a temporary registration if there are or were grounds for discipline as specified in section 30-14-412, Idaho Code, and the administrator does so within thirty (30) days after the filing of the application. If the administrator does not withdraw the temporary registration within the thirty (30) day period, registration becomes automatically effective on the thirty-first day after filing.

(d) Power to prevent registration. The administrator may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection (b) (1) or (2) of this section based on the public interest and the protection of investors.

(e) Termination of registration or application for registration. If the administrator determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser or investment adviser representative, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator or guardian, or cannot reasonably be located, a rule adopted or an order issued under this chapter may require the registration be canceled or terminated or the application denied. The administrator may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive.

History.

I.C., § 30-14-408, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provision: 1956 Act Section 204(d).

1. Under Sections 402(c) and 404(c) registration of an agent or investment adviser representative is effective only while the agent or investment adviser representative is employed by or associated with a broker-dealer, issuer, or investment adviser, as may be the case. Section 408(a) specifies a procedure to inform the administrator of a notice of termination.

2. To expedite transfer to a new broker-dealer or investment adviser, Section 408(b) provides a procedure by which agents or investment adviser representative registration will be effective immediately as of the date of new employment when there is no new or added disciplinary disclosure in the relevant Central Research Depository or Investment Adviser Registration Depository records. Both electronic systems are currently administered by the National Association of Securities Dealers. Section 408(d) is intended to ensure that the administrator has the authority to prevent immediate effectiveness in appropriate cases.

30-14-409. Withdrawal of registration of broker-dealer, agent, investment adviser and investment adviser representative. — Withdrawal of registration by a broker-dealer, agent, investment adviser or

investment adviser representative becomes effective sixty (60) days after the filing of the application to withdraw or within any shorter period as provided by a rule adopted or an order issued under this chapter unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by a rule adopted or an order issued under this chapter. The administrator may institute a revocation or suspension proceeding under section 30-14-412, Idaho Code, within one (1) year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending.

History.
I.C., § 30-14-409, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 204(e); RUSA Section 214.

1. This section generally follows the 1956 Act Section 204(e) and RUSA Section 214. This section does not affect any applicant's privilege of withdrawal of an application from registration before the registration becomes effective. It is simply designed to prevent withdrawal of an effective registration under fire. The last sentence preserves the ability of the administrator to initiate an action under Section 412 when the administrator does not know of a reason to object to withdrawal until after withdrawal has become effective.

2. Ordinarily today a registrant will file a standardized form such as Form U-5, BD-W or ADV-W to withdraw registration.

30-14-410. Filing fees. — (a) Broker-dealers. A person shall pay a fee of two hundred dollars ($200) when initially filing an application for registration as a broker-dealer and a fee of two hundred dollars ($200) when filing a renewal of registration as a broker-dealer. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(b) Agents. The fee for an individual is fifty dollars ($50.00) when filing an application for registration as an agent, a fee of fifty dollars ($50.00) when filing a renewal of registration as an agent, and a fee of fifty dollars ($50.00) when filing for a change of registration as an agent. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(c) Investment advisers. A person shall pay a fee of one hundred fifty dollars ($150) when filing an application for registration as an investment adviser and a fee of one hundred fifty dollars ($150) when filing a renewal of registration as an investment adviser. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(d) Investment adviser representatives. The fee for an individual is thirty dollars ($30.00) when filing an application for registration as an investment adviser representative, a fee of thirty dollars ($30.00) when filing a renewal of registration as an investment adviser representative, and a fee of thirty dollars ($30.00) when filing a change of registration as an investment adviser representative. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(e) Federal covered investment advisers. A federal covered investment adviser required to file a notice under section 30-14-405, Idaho Code, shall

pay an initial fee of thirty dollars ($30.00) and an annual notice fee of thirty dollars ($30.00).

(f) Payment. A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this chapter.

(g) Dual agent/investment adviser representative. An investment adviser representative who is registered as an agent under section 30-14-402, Idaho Code, and who represents a person that is both registered as a broker-dealer under section 30-14-401, Idaho Code, and registered as an investment adviser under section 30-14-403, Idaho Code, or required as a federal covered investment adviser to make a notice filing under section 30-14-405, Idaho Code, is not required to pay an initial or annual registration fee for registration as an investment adviser representative.

History.
I.C., § 30-14-410, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 202(b); RUSA Section 206.

1. Each state should determine the appropriate fee for each type of registration and for each type of renewal, denial, or withdrawal of a registration.

2. Similarly each state should determine whether it wishes to remove the brackets from Section 410(g) and charge a single fee for dually registered agents and investment adviser representatives.

3. If a State prefers to have the fees in this section established by rule, amend this section to read as follows, inserting the appropriate reference to the State's administrative procedure act:

[SECTION 410. FILING FEES.

(a) [*Fee established by administrator.*] The administrator shall establish fees by rule pursuant to the [state administrative procedure act] for:

(1) an initial filing of an application as a broker-dealer and renewal of an application by a broker-dealer for registration, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator;

(2) an application for registration as an agent and renewal of registration as an agent, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator;

(3) an application for registration as an investment adviser and renewal of registration as an investment adviser, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator.

(4) an application for registration as an investment adviser representative, a renewal of registration as an investment adviser representative, and a change of registration as an investment adviser representative, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator; and

(5) an initial fee and annual notice fee for a federal covered investment adviser required to file a notice under Section 405.

(b) [*Payment.*] A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this [Act].

(c) [*Dual agent/investment adviser representative.*] An investment adviser representative who is registered as an agent under Section 402 and who represents a person that is both registered as a broker-dealer under Section 401 and registered as an investment adviser under Section 403 or required as a federal covered investment adviser to make a notice filing under Section 405 is not required to pay an initial or annual registration fee for registration as an investment adviser representative.]

30-14-411. Postregistration requirements. — (a) Financial requirements. Subject to section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222 of the investment advisers act of 1940 (15

U.S.C. 80b-22) [15 U.S.C. 80b-18a]), a rule adopted or an order issued under this chapter may establish minimum financial requirements for broker-dealers registered or required to be registered under this chapter and investment advisers registered or required to be registered under this chapter.

(b) Financial reports. Subject to section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222(b) of the investment advisers act of 1940 (15 U.S.C. 80b-22 [15 U.S.C. 80b-18a]), a broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall file such financial reports as are required by a rule adopted or an order issued under this chapter. If the information contained in a record filed under this subsection is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Recordkeeping. Subject to section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-22 [15 U.S.C. 80b-18a]):

(1) A broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall make and maintain the accounts, correspondence, memoranda, papers, books and other records required by a rule adopted or an order issued under this chapter;

(2) Broker-dealer records required to be maintained under subsection (c)(1) of this section may be maintained in any form of data storage acceptable under section 17(a) of the securities exchange act of 1934 (15 U.S.C. 78q(a)) if they are readily accessible to the administrator; and

(3) Investment adviser records required to be maintained under subsection (c)(1) of this section may be maintained in any form of data storage required by a rule adopted or an order issued under this chapter.

(d) Audits or inspections. The records of every person issuing or guaranteeing any securities subject to the provisions of this chapter, if such person is registered or required to be registered under this chapter, and of every broker-dealer, agent, investment adviser or investment adviser representative registered or required to be registered under this chapter are subject to such reasonable periodic, special or other audits or inspections by a representative of the administrator, within or without this state, as the administrator considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The administrator may copy, and may remove for audit or inspection copies of, all records the administrator reasonably considers necessary or appropriate to conduct the audit or inspection. The administrator may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) Custody and discretionary authority bond or insurance. Subject to section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-22 [15 U.S.C. 80b-18a]), a rule adopted or an order issued under this chapter may require a broker-dealer or investment adviser that has custody of or

discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security in an amount not to exceed twenty-five thousand dollars ($25,000). The administrator may determine the requirements of the insurance, bond or other satisfactory form of security. Insurance or a bond or other satisfactory form of security may not be required of a broker-dealer registered under this chapter whose net capital exceeds, or of an investment adviser registered under this chapter whose minimum financial requirements exceed, the amounts required by rule or order under this chapter. The insurance, bond or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond or other satisfactory form of security if instituted within the time limitations in section 30-14-509(j)(2), Idaho Code.

(f) Requirements for custody. Subject to section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-22 [15 U.S.C. 80b-18a]), an agent may not have custody of funds or securities of a customer except under the supervision of a broker-dealer and an investment adviser representative may not have custody of funds or securities of a client except under the supervision of an investment adviser or a federal covered investment adviser. A rule adopted or an order issued under this chapter may prohibit, limit, or impose conditions on a broker-dealer regarding custody of funds or securities of a customer and on an investment adviser regarding custody of securities or funds of a client.

(g) Investment adviser brochure rule. With respect to an investment adviser registered or required to be registered under this chapter, a rule adopted or an order issued under this chapter may require that information or other record be furnished or disseminated to clients or prospective clients in this state as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(h) Continuing education. A rule adopted or an order issued under this chapter may require an individual registered under section 30-14-402 or 30-14-404, Idaho Code, to participate in a continuing education program approved by the securities and exchange commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or an order issued under this chapter may require continuing education for an individual registered under section 30-14-404, Idaho Code.

History.
I.C., § 30-14-411, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertions in subsections (a), (b), (c), (e), and (f) were added by the compiler to correct the federal reference and to conform to the uniform act.

The words enclosed in parentheses so appeared in the law as enacted.

JUDICIAL DECISIONS

Production of Records.

Idaho department of finance did not have the authority to request a securities agent's list of clients' addresses and telephone numbers, her financial records, and her personal bank account records, as they were not the type of records subject to the recordkeeping requirements, and, therefore, the agent's license should not have been suspended as a result of her refusal to produce these records. In re Karel, 144 Idaho 379, 162 P.3d 758 (2007).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Sections 102(c), 202(d) and (e) and 203; RUSA Sections 209, 211 and 215.

1. Sections 411(a) through (c) and (e) through (f) implicitly refer to "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements." Under the National Securities Markets Improvement Act of 1996, States may not impose such requirements on covered broker-dealers and investment advisers greater than those specified in Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Advisors Act of 1940.

2. Minimum financial requirements must be maintained during the entire time a person is registered and not merely at the time of the registration. See, e.g., *National Grange Mut. Ins. Co. v. Prioleau*, 236 S.E.2d 808 (S.C. 1977) (continuing bond requirement); *Ridgeway, McLeod & Assoc.*, 281 A.2d 390 (N.J. Super. Ct. App. Div. 1971) (continuing minimum capital requirement).

3. The duty in Section 411(b) to correct or update information is limited to material information which a reasonable investor would continue to consider important in deciding whether to purchase or sell securities. Cf. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444-450 (1970); Securities Act Release No. 6084, 17 SEC Dock. 1048, 1054 (1979) ("persons are continuing to rely on all or any material portion of the statements").

4. Section 411(c)(1) authorizes the administrator to require all records to be preserved for the period the administrator prescribes by rule or order.

5. Rule 17a-4 is the current rule under Section 17(a) of the Securities Exchange Act referred to in Section 411(c)(2) that addresses acceptable forms of data storage.

6. The administrator's power to copy and examine records in Section 411(d) is subject to all applicable privileges. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4921-4925 n.69 (3d ed. rev. 1996). The power in Section 411(d) to conduct audits or inspections is distinguishable from the administrator's enforcement powers under Section 602. No subpoena is necessary under Section 411(d). Failure to submit to a reasonable audit or inspection is a violation of this Act which may result in an action by the administrator under Section 412(d)(8), a criminal prosecution under Section 508, or an injunction under Section 603. An unreasonable audit, inspection or demand for information or documents would be subject to challenge in an appropriate court.

7. Section 411(f) broadens 1956 Act Section 102(c) and RUSA Section 215 to apply to agents as well as investment adviser representatives. Subject to Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Adviser Act of 1940, the administrator is given broad authority to prohibit, limit, or condition custody arrangements.

8. Section 411(g) parallels Rule 204-3, adopted under the Investment Advisers Act of 1940, popularly known as the brochure rule, which authorizes the SEC to require dissemination to investment adviser clients of specified information about the investment adviser and investment advice.

30-14-412. Denial, revocation, suspension, withdrawal, restriction, condition or limitation of registration. — (a) Disciplinary conditions — Applicants. If the administrator finds that the order is in the public interest and subsection (d) of this section authorizes the action, an order issued under this chapter may deny an application, or may condition or limit registration of an applicant to be a broker-dealer, agent, investment adviser or investment adviser representative, and, if the applicant is a broker-dealer or investment adviser of any partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser.

(b) Disciplinary conditions — Registrants. If the administrator finds that the order is in the public interest and subsection (d) of this section authorizes the action, an order issued under this chapter may revoke, suspend, condition or limit the registration of a registrant and, if the registrant is a broker-dealer or investment adviser of any partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser. Provided however, the administrator may not:

(1) Institute a revocation or suspension proceeding under this subsection based on an order issued under a law of another state that is reported to the administrator or a designee of the administrator more than one (1) year after the date of the order on which it is based; or

(2) Under subsection (d)(5)(A) or (B) of this section, issue an order on the basis of an order issued under the securities act of another state unless the other order was based on conduct for which subsection (d) of this section would authorize the action had the conduct occurred in this state.

(c) Disciplinary penalties — Registrants. If the administrator finds that the order is in the public interest and subsections (d)(1) through (6), (8), (9), (10), (12) or (13) of this section authorizes the action, an order under this chapter may censure, impose a bar or suspension from association with a broker-dealer or investment adviser registered in this state, or impose a civil penalty in an amount not to exceed five thousand dollars ($5,000) for each violation, on a registrant and, if the registrant is a broker-dealer or investment adviser, a partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser.

(d) Grounds for discipline. A person may be disciplined under subsections (a) through (c) of this section if the person:

(1) Has filed an application for registration in this state under this chapter or the predecessor act within the previous ten (10) years, which, as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) Willfully violated or willfully failed to comply with this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act within the previous ten (10) years;

(3) Has been convicted of any felony or within the previous ten (10) years has been convicted of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance;

(4) Is enjoined or restrained by a court of competent jurisdiction in an action instituted by the administrator under this chapter or the predecessor act, a state, the securities and exchange commission, or the United States from engaging in or continuing an act, practice or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance;

(5) Is the subject of an order, issued after notice and opportunity for hearing by:

(A) The securities, depository institution, insurance or other financial services regulator of a state or by the securities and exchange commission or other federal agency denying, revoking, barring or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative;

(B) The securities regulator of a state or the securities and exchange commission against a broker-dealer, agent, investment adviser, investment adviser representative, or federal covered investment adviser;

(C) The securities and exchange commission or a self-regulatory organization suspending or expelling the registrant from membership in the self-regulatory organization;

(D) A court adjudicating a United States postal service fraud order;

(E) The insurance regulator of a state denying, suspending or revoking registration as an insurance agent; or

(F) A depository institution regulator suspending or barring the person from the depository institution business;

(6) Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the securities and exchange commission, the commodity futures trading commission; the federal trade commission; a federal depository institution regulator, or a depository institution, insurance or other financial services regulator of a state that the person willfully violated the securities act of 1933, the securities exchange act of 1934, the investment advisers act of 1940, the investment company act of 1940, or the commodity exchange act, the securities or commodities law of a state, or a federal or state law under which a business involving investments, franchises, insurance, banking or finance is regulated;

(7) Is insolvent, either because the person's liabilities exceed the person's assets or because the person cannot meet the person's obligations as they mature, provided however that the administrator may not enter an order against an applicant or registrant under this paragraph (7) without a finding of insolvency as to the applicant or registrant;

(8) Refuses to allow or otherwise impedes the administrator from conducting an audit or inspection under section 30-14-411(d), Idaho Code, or refuses access to a registrant's office to conduct an audit or inspection under section 30-14-411(d), Idaho Code;

(9) Has failed to reasonably supervise an agent, investment adviser representative or other individual, if the agent, investment adviser representative or other individual was subject to the person's supervision and committed a violation of this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act within the previous ten (10) years;

(10) Has not paid the proper filing fee within thirty (30) days after having been notified by the administrator of a deficiency, provided however that the administrator shall vacate an order under this paragraph (10) when the deficiency is corrected;

(11) After notice and opportunity for a hearing, has been found within the previous ten (10) years:

(A) By a court of competent jurisdiction to have willfully violated the laws of a foreign jurisdiction under which the business of securities,

commodities, investment, franchises, insurance, banking or finance is regulated;

(B) To have been the subject of an order of a securities regulator of a foreign jurisdiction denying, revoking or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative or similar person; or

(C) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;

(12) Is the subject of a cease and desist order issued by the securities and exchange commission or issued under the securities, commodities, investment, franchise, banking, finance or insurance laws of a state;

(13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance or insurance business within the previous ten (10) years; or

(14) Is not qualified on the basis of factors such as training, experience and knowledge of the securities business. Provided however, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser representative, a denial order may not be based on this paragraph (14) if the individual has successfully completed all examinations required by subsection (e) of this section. The administrator may require an applicant for registration under section 30-14-402 or 30-14-404, Idaho Code, who has not been registered in a state within the two (2) years preceding the filing of an application in this state to successfully complete an examination.

(e) Examinations. A rule adopted or an order issued under this chapter may require that an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all individuals. An order issued under this chapter may waive, in whole or in part, an examination as to an individual and a rule adopted under this chapter may waive, in whole or in part, an examination as to a class of individuals if the administrator determines that the examination is not necessary or appropriate in the public interest and for the protection of investors.

(f) Summary process. The administrator may suspend or deny an application summarily; restrict, condition, limit or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon the issuance of an order, the administrator shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within fifteen (15) days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator within thirty (30) days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

(g) Procedural requirements. An order issued may not be issued under this section, except under subsection (f) of this section, without:

(1) Appropriate notice to the applicant or registrant;

(2) Opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with chapter 52, title 67, Idaho Code.

(h) Control person liability. A person that controls, directly or indirectly, a person not in compliance with this section may be disciplined by order of the administrator under subsections (a) through (c) of this section to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this section.

(i) Limit on investigation or proceeding. The administrator may not institute a proceeding under subsection (a), (b) or (c) of this section based solely on material facts actually known by the administrator unless an investigation or the proceeding is instituted within one (1) year after the administrator actually acquires knowledge of the material facts.

History.

I.C., § 30-14-412, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 2, p. 420; am. 2012, ch. 65, § 5, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, in subsection (a) and in the introductory paragraph in subsection (b), substituted "or a partner" for "of a partner."

The 2012 amendment, by ch. 65, substituted "of any partner" for "or a partner" in subsection (a) and in the introductory paragraph in subsection (b).

Federal References.

The federal references in subsection (d)(6) of this section are codified as follows: The Securities Act of 1933, 15 U.S.C.S., § 77a et seq.; the Securities Exchange Act of 1934, 15 U.S.C.S., § 78a et seq.; the Investment Advisers Act of 1940, 15 U.S.C.S. § 80b-1 et seq.; the Investment Company Act of 1940, 15 U.S.C.S. § 80a-1 et seq.; and the commodity exchange act, 7 U.S.C.S. § 1 et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

For more on the United States commodity futures trading commission, see *http://www.cftc.gov/index.htm*.

For more on the federal trade commission, see *http://ftc.gov/*.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 204; RUSA Sections 207, 212-213.

1. Section 412 generally follows Section 204 of the 1956 Act and Sections 207 and 212-213 of RUSA, but has been modified to reflect subsequent developments that have broadened the scope and remedies of counterpart federal and state statutes.

2. Section 412 authorizes the administrator to seek a sanction based on the seriousness of the misconduct. Under Section 412 the administrator must prove that the denial, revocation, suspension, cancellation, withdrawal, restriction, condition, or limitation both is (1) in the public interest and (2) involves one of the enumerated grounds in Section 412(d). See, e.g., *Mayflower Sec. Co., Inc. v. Bureau of Sec.*, 312 A.2d 497 (N.J. 1973). The "public interest" is a much litigated concept that has come to have settled meanings. See generally 6 L. Loss & J. Seligman, Securities Regulation 3103.5-3103.18 (3d ed. rev. 2002) (under federal securities laws). The public interest will not require imposition of a sanction for every minor or technical violation of subsection (d).

3. The term "foreign" means a jurisdiction outside of the United States, not a different state within the United States.

4. Section 412(a) through (c) authorizes the administrator to proceed against an entire firm, regardless of whether the administrator proceeds against any individual, when an individual partner, officer, or director or per-

son occupying a similar status or performing similar functions, or a controlling person is disciplined under subsection (d), but only if proceeding against the entire firm is in the public interest. The discipline of such an individual may not automatically be used against a broker-dealer or investment adviser. When, however, there is a failure to reasonably supervise, see Section 412(d)(9) or control person liability, see Section 412(h), the administrator is empowered to proceed against a firm in an appropriate case. In Section 412, "any partner, officer, or director, any person occupying a similar status or performing similar function." can include a branch manager, assistant branch manager, or other supervisor.

5. In Section 412(d)(1) the completeness and accuracy of an effective application for registration is tested as of the appropriate effective date. An application that becomes incomplete or inaccurate after its effective date is not a ground for discipline under paragraph (d)(1). In an appropriate case, an action might be available under paragraph (d)(2) and Section 406(b). On the other hand, in a proceeding to deny effectiveness to a pending application for registration, the completeness and accuracy of the application is not limited to the effective date and can be judged on any date after filing.

6. The term "willfully" in Section 412(d)(2) and (11)(A) is discussed in Comment 2 to Section 508.

7. There is no time limit or statute of limitations on felony convictions in Section 412(d)(3) as a ground for disciplinary action.

8. The present tense of the verb "is" in Sections 412(d)(4) through (6) and (12) means that an injunction, order, adjudication, or determination that has expired or been vacated is no longer a ground for discipline.

9. In Sections 412(d)(5) and (6) the administrator is not required to prove the validity of the ground which led to the earlier disciplinary order.

10. Under Section 412(d)(7) the administrator may not proceed against a broker-dealer or investment adviser firm on the basis of the insolvency of a partner, officer, director, controlling person or other person specified in subsection (b), unless it is a sole proprietorship.

11. Section 412(d)(8) can be violated by a refusal to cooperate with an administrator's reasonable audit or inspection, including by withholding or concealing records, refusing to furnish required records, or refusing the administrator reasonable access to any office or location within an office to conduct an audit or inspection under this Act. However, a request by a person subject to an audit or inspection for a reasonable delay to obtain assistance of counsel does not constitute a violation of Section 412(d)(8).

12. The term "failed to supervise reasonably" in Section 412(d)(9) includes not having reasonable supervisory procedures in place as well as a proper system of supervision and internal control. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Section 15(b)(4)(E) of the Securities Exchange Act of 1934 similarly addresses "failure to supervise reasonably." See 6 Louis Loss & Joel Seligman, Securities Regulation 3097-3101 (3d ed. rev. 2002).

13. The term "dishonest and unethical practices" in Section 412(d)(13) has been held not to be unconstitutionally vague. See, e.g., *Brewster v. Maryland Sec. Comm'n*, 548 A.2d 157, 160 (M.D. Ct. Spec. App. 1988) ("a broad statutory standard is not vague if it has a meaningful referent in business practice, custom or usage"); *Johnson-Bowles Co. v. Division of Sec.*, 829 P.2d 101, 114 (Utah Ct. App. 1992) (such legislative language bespeaks a legislative intent to delegate the interpretation of what constitutes "dishonest and unethical practices" in the securities industry to the administrator). Ministerial or clerical violations of a statute or rule, if immaterial and occurring without intent or recklessness, typically would not constitute dishonest or unethical practices.

14. Under the counterparts to Section 412(d)(14) and (e) applicants to become agents of broker-dealers typically take standardized tests administered by the National Association of Securities Dealers, Inc.

15. Sections 412(f) and (g) amplify the earlier procedures found in Section 204(f) of the 1956 Act and are intended to facilitate summary disciplinary proceedings, when these are appropriate.

16. Section 412(i) parallels the language of Section 204 of the 1956 Act and Section 212(b) of RUSA with some significant changes. The time period in which the administrator can act has been extended to one year from 30 days in the 1956 Act and 90 days in RUSA. The limitation on instituting a proceeding can also be tolled by instituting a formal investigation. The addition of the word "solely" is intended to make it clear that an administrator may consider the prior history of an applicant or registrant even if that prior history had been known to the administrator for more than one year if there are additional material facts which are actually known to the administrator within the last year.

17. "Actually known" in Section 412(i) is used to signify that the mere filing of material facts in the Central Registration Depository or Investment Advisory Registration Depository systems does not constitute actual knowledge, unless that information was re-

ceived by the administrator, or, but for a decision by the administrator, would have been received by the administrator.

Part 5. Fraud and Liabilities

30-14-501. General fraud. — It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) To employ a device, scheme, or artifice to defraud;

(2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

(3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person; or

(4) To divert investor money to the personal use of the issuer, offeror or seller, or to pay prior investors without specifically disclosing that use before receiving the investor's money.

History.

I.C., § 30-14-501, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 6, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added subsection (4).

JUDICIAL DECISIONS

Detrimental Reliance.

Detrimental reliance is not required when the department of finance is pursuing an enforcement action for the offer of securities under this section. State Dep't of Fin. v. Tenney, 124 Idaho 243, 858 P.2d 782 (Ct. App. 1993).

Cited in: Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 101; RUSA Section 501.

1. Section 501, which was Section 101 in the 1956 Act, was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a), and Section 101 of the 1956 Act. Section 501 is not identical to either Rule 10b-5 or Section 17(a).

2. There are no exemptions from Section 501.

3. Section 501 applies to any securities offer, sale or purchase, including offers, sales, or purchases involving registered, exempt, or federal covered securities. It would also apply to a rescission offer under Section 510.

4. The possible consequences of violating Section 501 are many. These include denial, suspension, or revocation of securities registration under Section 306; denial, revocation, suspension, withdrawal, restriction, condition or limitation of a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412; criminal prosecution under Section 508; civil enforcement proceedings under Sections 603; and administrative proceedings under 604.

5. Because Section 501, like Rule 10b-5, reaches market manipulation, see 8 Louis Loss & Joel Seligman, Securities Regulation Ch. 10D (3d ed. 1991), this Act does not include the RUSA market manipulation Section 502, which had no counterpart in the 1956 Act.

6. The culpability required to be pled or proved under Section 501 is addressed in the

relevant enforcement context. See, e.g., Section 508, criminal penalties, where "willfulness" must be proven; Section 509, civil liabilities, which includes a reasonable care defense; or civil and administrative enforcement actions under Sections 603 and 604, where no culpability is required to be pled or proven.

7. There is no private cause of action, express or implied, under Section 501. Section 509(m) expressly provides that only Section 509 provides a private cause of action for conduct that could violate Section 501.

30-14-502. Prohibited conduct in providing investment advice. — (a) Fraud in providing investment advice. It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

(1) To employ a device, scheme, or artifice to defraud another person;

(2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person; or

(3) To divert investor money to the personal use of the issuer, offeror or seller, or to pay prior investors without specifically disclosing that use before receiving the investor's money.

(b) Rules defining fraud. A rule adopted under this chapter may define an act, practice, or course of business of an investment adviser or an investment adviser representative, as fraudulent, deceptive or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive or manipulative.

(c) Rules specifying contents of advisory contract. A rule adopted or an order issued under this chapter may specify the contents of an investment advisory contract entered into, extended or renewed by an investment adviser.

History.

I.C., § 30-14-502, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 7, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added paragraph (a)(3).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 102(a); RUSA Section 503.

1. Section 502(a) applies to any person that commits fraud in providing investment advice. Section 502(b) is not limited to persons registered as investment advisers or investment adviser representatives.

2. A person can violate both Section 501 and Section 502 if the person violates Section 502 in connection with the offer, purchase, or sale of a security.

3. The rulemaking authority under Sections 502(b) and (c) would provide the basis for existing NASAA rules concerning investment advisers, to the extent these rules are not preempted by the National Securities Markets Improvement Act of 1996.

4. Under Section 203A(b)(2) of the Invest-

ment Advisers Act States retain their authority to investigate and bring enforcement actions with respect to fraud or deceit against a federal covered investment adviser or a person associated with a federal covered investment adviser. Under Section 502(a), which applies to any person, a State could bring an enforcement action against a federal covered investment adviser, including a federal covered investment adviser excluded from the definition of investment adviser in Section 102(15)(E).

5. There is no private cause of action, express or implied, under Section 502. Section 509(m) expressly provides that only Section 509 provides for a private cause of action for prohibited conduct in providing investment advice that could violate Section 502.

30-14-503. Evidentiary burden. — (a) Civil. In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden to prove the applicability of the claim.

(b) Criminal. In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden of going forward with evidence of the claim.

History.

I.C., § 30-14-503, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 402(d); RUSA Section 608.

1. As specified in Section 503(a), in a civil or administrative action, the person claiming an exemption, exception, preemption, or exclusion has the burden of persuasion.

2. In contrast, in a criminal action under Section 503(b), the prosecutor is required to prove each element of a crime "beyond a reasonable doubt." The defendant only has the burden of producing evidence of an exemption, exception, preemption, or exclusion. Some court decisions have characterized this burden as an affirmative defense. See, e.g., United States ex. rel. Schott v. Tehan, 365 F.2d 191, 195 (6th Cir. 1966) (Ohio blue sky law constitutionally shifts burden of production to defendant); Commonwealth v. David, 309 N.E.2d 484, 488 (Mass. 1974) (exemption is an affirmative defense); State v. Frost, 387 N.E.2d 235, 238-239 (Ohio 1979) (it is not unconstitutional to require the burden of proof as an affirmative defense to prove a securities law exemption); State v. Andersen, 773 A.2d 328 (Conn. 2001) (an exemption from registration is an affirmative defense to the charge of selling unregistered securities).

30-14-504. Filing of sales and advertising literature. — (a) Filing requirement. Except as otherwise provided in subsection (b) of this section, a rule adopted or an order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

(b) Excluded communications. This section does not apply to sales and advertising literature specified in subsection (a) of this section which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by section 30-14-201, 30-14-202 or 30-14-203, Idaho Code, except as required pursuant to section 30-14-201(7), Idaho Code.

History.
I.C., § 30-14-504, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 403; RUSA Section 405.

1. The prospectuses, pamphlets, circulars, form letters, advertisements, sales literature or advertising communications, include material disseminated electronically or available on a web site.

2. The administrator may bring a civil enforcement action in a court under Section 603 or institute administrative enforcement under Section 604 to prevent publication, circulation or use of any materials required by the administrator to be filed under Section 504 that have not been filed.

3. Section 504(b) is meant to refer to the communications described in Section 504(a).

30-14-505. Misleading filings. — It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

History.
I.C., § 30-14-505, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions. 1956 Act Section 404; RUSA Section 504.

The definition of "materiality" in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote") has generally been followed in both federal and state securities law. See 4 Louis Loss & Joel Seligman, Securities Regulation 2071-2105 (3d ed. rev. 2000).

30-14-506. Misrepresentations concerning registration or exemption. — The filing of an application for registration, a registration statement, a notice filing under this chapter, the registration of a person, the notice filing by a person, or the registration of a security under this chapter does not constitute a finding by the administrator that a record filed under this chapter is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption or exclusion for a security or a transaction does not mean that the administrator has passed upon the merits or qualifications of, or recommended or given approval to, a person, security or transaction. It is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client a representation inconsistent with this section.

History.
I.C., § 30-14-506, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 405; RUSA Section 505.

This Section follows the 1956 Act and RUSA, as well as state securities statutes generally, in providing that a misrepresentation concerning registration or an exemption is unlawful.

30-14-507. Qualified immunity. — A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the securities and exchange commission or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

History.

I.C., § 30-14-507, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Source of Law: National Association of Securities Dealers, Inc. Proposal Relating to Qualified Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.

1. In 1994 The Securities and Exchange Commission Division of Market Regulation published The Large Firm Project: A Review of Hiring, Retention, and Supervisory Practices (1994), which found that a small number of "rogue brokers" were responsible for a significant proportion of customer disciplinary complaints. These brokers in some instances moved from one broker-dealer firm to another, it was explained, without full and complete disclosure of disciplinary problems by the broker-dealer, because of broker-dealer firms' fear of state law defamation claims. See also GAO, Actions Needed to Better Protect Investors against Unscrupulous Brokers 3 (1994); Testimony of SEC Chairman Arthur Levitt Concerning the Large Firm Project, Subcomm. on Telecommunications & Fin., House Comm. on Energy & Commerce (Sept. 14, 1994), *reprinted in* 1994-1995 Fed. Sec. L. Rep. (CCH) ¶ 85,433 (1994).

2. In 1998, the National Association of Securities Dealers proposed qualified immunity for statements made in Forms U-4 and U-5 to address this problem. This proposal was reprinted in Securities Exchange Act Release 39,892, 66 SEC Dock. 2473 (1998). This proposal was limited to arbitration proceedings. It was not acted on by the Securities and Exchange Commission.

3. An alternative approach would be a standard providing for absolute immunity. See generally Anne Wright, Form U-5 Defamation, 52 Wash. & Lee L. Rev. 1299 (1995); *Acciardo v. Millennium Sec. Corp.*, 83 F. Supp. 2d 413 (S.D.N.Y. 2000) (discussing both New York qualified and absolute immunity cases).

4. Securities administrators or self-regulatory organizations generally are subject to absolute or qualified immunity for actions of their employees within the course of their official duties. See 10 Louis Loss & Joel Seligman, Securities Regulation 4818-4821 (3d ed. rev. 1996).

5. As is generally the law "truth is a complete defense to a defamation action." *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 308 (6th Cir. 1998).

6. An agent who has been the subject of a Form U-5, Uniform Termination Notice for Securities Industry Registration, may respond to specified adverse disclosures and have her or his responses reprinted on the published version of Form U-5.

7. Through September 2002 no state had adopted an immunity provision in its securities statute. No state has rejected immunity in this context by judicial decision. A number of states have adopted qualified immunity by judicial decision. See, e.g., *Eaton Vance Distrib., Inc. v. Ulrich*, 692 So.2d 915 (Fla. Dist. Ct. App. 1997); *Bavarati v. Josephal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) (Illinois); *Andrews v. Prudential Sec., Inc.*,

160 F.3d 304 (6th Cir. 1998) (Michigan); *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996) (Oklahoma); *Glennon v. Dean Witter Reynolds Inc.*, 83 F.3d 132 (6th Cir. 1996) (Tennessee).

30-14-508. Criminal penalties. — (a) Criminal penalties. A person that willfully violates this chapter, or a rule adopted or an order issued under this chapter, except section 30-14-504, Idaho Code, or the notice filing requirements of section 30-14-302 or 30-14-405, Idaho Code, or that willfully violates section 30-14-505, Idaho Code, knowing the statement made to be false or misleading in a material respect, shall be guilty of a felony and upon conviction, shall be fined not more than ten thousand dollars ($10,000) or imprisoned not more than five (5) years, or both. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

(b) A person that willfully violates section 30-14-501 or 30-14-502(a), Idaho Code, and in connection with that violation, the violator knowingly accepts any money representing:

(1) Equity in a person's home;

(2) A withdrawal from any individual retirement account or similar retirement account; or

(3) A withdrawal from any qualified retirement plan as defined in the Internal Revenue Code,

shall upon conviction be punished by imprisonment for not less than three (3) years or more than fifteen (15) years if, at the time the crime was committed, the property, money or thing unlawfully obtained or sought to be obtained was worth ten thousand dollars ($10,000) or more.

(c) If, in the commission of an offense described in subsection (a) or (b) of this section, the victim is an elder or dependent adult, and the violator has knowledge that the victim is an elder or dependent adult, the defendant shall receive an additional term of imprisonment as follows:

(1) Three (3) years if the victim is under seventy (70) years of age.

(2) Five (5) years if the victim is seventy (70) years of age or older.

(d) As used in this section, "elder" means any person who is sixty-five (65) years of age or older.

(e) As used in this section, "dependent adult" means any person who is between the ages of eighteen (18) and sixty-four (64) years, who has physical or mental limitations which restrict the person's ability to carry out normal activities or to protect the person's rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.

(f) No indictment or information may be returned under this chapter more than five (5) years after the alleged violation.

(g) Criminal reference not required. The attorney general or the proper prosecuting attorney with or without a reference from the administrator, may institute criminal proceedings under this chapter.

(h) No limitation on other criminal enforcement. This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

History.
I.C., § 30-14-508, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Cross References.
Attorney general, § 67-1401 et seq.

JUDICIAL DECISIONS

Analysis

Limitation on action.
Sentence upheld.
Willfully.

Limitation on action.
Defendant's securities fraud crimes were governed by the five-year statute of limitation in the securities law, rather than by the three-year statute of limitation generally applicable to all felonies, § 19-402. State v. Burchard, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

Sentence Upheld.
Where defendant, who pled guilty to three counts of omitting material facts in the sale of securities, was convicted and sentenced to a suspended three-year term with nine years of probation and ordered to make $42,000 in restitution to the defrauded investors and to perform 2,500 hours of community service, the trial court did not abuse its sentencing discretion by failing to grant a withheld judgment, because the public interest would be best served by requiring defendant to make restitution, keeping defendant out of the security-advising field, and deterring others. State v. Geier, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985).

Willfully.
Although "wilfulness" is not specifically defined within the provisions of the law governing the sale of securities, since both the securities laws and the criminal code relate to criminal prosecutions, the definition of wilfulness, as set forth in the criminal code, is applicable. See § 18-101. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 409; RUSA Section 604; Securities Exchange Act of 1934 Section 32(a).

1. This Section follows the 1956 Act and the federal securities laws in imposing criminal penalties for any willful violation of the Act. RUSA Section 604 distinguished between felonies and misdemeanors, limiting willful violations of cease and desist orders to a misdemeanor.

2. The term "willfully" has the same meaning in Section 508 as it did in the 1956 Act. All that is required is proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.

3. The final sentence of Section 508(a) is based on Section 32(a) of the Securities Exchange Act of 1934, which provides: "[N]o person shall be subject to imprisonment under this section in violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." The "no knowledge" clause in Section 508(a) is relevant only to sentencing. The person convicted has the burden of persuasion to prove no knowledge at sentencing. Because this does not impose a burden on the defendant to disprove the elements of a crime, Section 32(a) of the Securities Exchange Act of 1934 has been held not to raise a constitutional problem. *United States v. Mandel*, 296 F. Supp. 1038, 1040 (S.D.N.Y. 1969).

4. The appropriate state prosecutor under Section 508(b) may decide whether to bring a criminal action under this statute, another statute, or, when applicable, common law. In certain states the administrator has full or limited criminal enforcement powers.

5. This section does not specify maximum dollar amounts for criminal fines, maximum terms for imprisonment, nor the years of limitation, but does provide for each state to specify appropriate magnitudes for criminal fines or maximum terms for imprisonment.

6. The definition of willfulness in Comment 2 to Section 508 has been followed by most courts. See, e.g., *State v. Hodge*, 460 P.2d 596,

604 (Kan. 1969) ("No specific intent is necessary to constitute the offense where one violates the securities act except the intent to do the act denounced by the statute"); *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979) ("[I]t is widely understood that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer"); *State v. Fries*, 337 N.W.2d 398, 405 (Neb. 1983) (proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state's blue sky law); *People v. Riley*, 708 P.2d 1359, 1362 (Colo. 1985) ("A person acts 'knowingly' or 'willfully' with respect to conduct ... when he is aware that his conduct ... exists"); *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993) (willful implies a willingness to commit the act, not an intent to violate the law or to injure another or acquire any advantage); *State v . Montgomery*, 17 P.3d 292, 294 (Idaho 2001) (bad faith is not required for a violation of a state securities act; willful implies "simply a purpose or willingness to commit the act or make the omission referred to"); *State v. Dumke*, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995) (*mens rea* not required); *State v. Mueller*, 549 N.W.2d 455, 460 (Wis. Ct. App. 1996) (willfulness does not require proof that the defendant acted with intent to defraud or knowledge that the law was violated); *United States v. Lilley*, 291 F. Supp. 989, 993 (S.D. Tex. 1968) ("no knowledge" clause in federal statute not available to defendant claiming lack of knowledge of particular SEC rule).

30-14-509. Civil liability. — (a) Securities litigation uniform standards act. Enforcement of civil liability under this section is subject to the securities litigation uniform standards act of 1998, as cited in section 30-14-103, Idaho Code.

(b) Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of section 30-14-301, Idaho Code, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in subsection (b)(3) of this section.

(2) The tender referred to in subsection (b)(1) of this section may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subsection (b)(3) of this section.

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, costs, and reasonable attorneys' fees determined by the court.

(c) Liability of purchaser to seller. A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement

made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of the purchase price, or for actual damages as provided in subsection (c)(3) of this section.

(2) The tender referred to in subsection (c)(1) of this section may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in subsection (c)(3) of this section.

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale of the security, costs, and reasonable attorneys' fees determined by the court.

(d) Liability of unregistered broker-dealer and agent. A person acting as a broker-dealer or agent that sells or buys a security in violation of section 30-14-401(a), 30-14-402(a) or 30-14-506, Idaho Code, is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3) of this section, or, if a seller, for a remedy as specified in subsections (c)(1) through (3) of this section.

(e) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 30-14-403(a), 30-14-404(a) or 30-14-506, Idaho Code, is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of payment, costs, and reasonable attorneys' fees determined by the court.

(f) Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the fraudulent conduct, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) Joint and several liability. The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f) of this section:

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f) of this section, unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f) of this section, including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) of this section and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f) of this section, unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) Right of contribution. A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(i) Survival of cause of action. A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(j) Statute of limitations. A person may not obtain relief:

(1) Under subsection (b) of this section for violation of section 30-14-301, Idaho Code, or under subsection (d) or (e) of this section, unless the action is instituted within one (1) year after the violation occurred; or

(2) Under subsection (b) of this section, other than for violation of section 30-14-301, Idaho Code, or under subsection (c) or (f) of this section, unless the action is instituted within the earlier of two (2) years after discovery of the facts constituting the violation or five (5) years after the violation.

(k) No enforcement of violative contract. A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or an order issued under this chapter, or that has acquired a

purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter, may not base an action on the contract.

(*l*) No contractual waiver. A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or an order issued under this chapter is void.

(m) Survival of other rights or remedies. The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this section or section 30-14-411(e), Idaho Code.

History.

I.C., § 30-14-509, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities litigation uniform standards act of 1998, referred to in subsection (a), is generally codified as 15 USCS § 77p and 78bb(f).

JUDICIAL DECISIONS

Analysis

Attorneys' fees.
Statute of limitations.
Venue.

Attorneys' Fees.

The mere inclusion of reasonable attorneys' fees as an item of recovery does not mean that the subject of attorneys' fees should have been submitted to the jury as a question at law; the allowance and amount of attorneys' fees is not a jury question, but is within the sound discretion of the trial judge. Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984).

Statute of Limitations.

Defendant's securities fraud crimes were governed by the statute of limitation specifically set out in the securities act, providing for criminal punishment for violations of the act, rather than by the statute of limitations applicable to all felonies, § 19-402. State v. Burchard, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

Venue.

In a securities case brought by the shareholders against the corporation and its representatives, alleging fraud, venue was proper in the county where the offer to sell was made and the shares were sold. Hayes v. Kingston, 140 Idaho 551, 96 P.3d 652 (2004).

Cited in: Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 410; RUSA Sections 605-607, 609, 802.

1. Under Section 509 violations of two or more sections can be proven, but the remedy is limited either to rescission or actual damages. Actual damages means compensatory damages. Punitive or "double" damages are not provided by this section which also is the standard under Section 28(a) of the Securities Exchange Act of 1934. See 9 Louis Loss & Joel Seligman, Securities Regulation 4408-4427 (3d ed. rev. 1992).

2. The Securities Litigation Uniform Standards Act of 1998 cited in Section 509(a) modifies the entire Section 509.

3. As with Section 12(a)(2) of the Securities Act of 1933, Section 509(b) contains a type of privity requirement in that the purchaser is required to bring an action against the seller. Section 509(b) is broader than Section

12(a)(2) in that it will reach all sales in violation of Section 301, not just sales "by means of a prospectus" as is the law under Section 12(a)(2). See Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).

4. Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b). See *Gerhard W. Gohler, IRA v. Wood*, 919 P.2d 561 (Utah 1996); *Ritch v. Robinson-Humphrey Co.*, 748 So. 2d 861 (Ala. 1999); *Kaufman v. I-Stat Corp.*, 754 A.2d 1188 (N.J. 2000).

5. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of the Securities of 1933. See 9 Louis Loss and Joel Seligman, Securities Regulations 4242-4246 (3d ed. 1992). The measure of damages in Section 509(c)(3), however, is that contemplated by Rule 10b-5. Sec. 9 id. 4408-4427. In providing for damages as an alternative to rescission, Section 509(b)(3) follows the 1956 Act and is an improvement upon many earlier state provisions, which conditioned the plaintiff's right of recovery on his or her being in a position to make a good tender. A plaintiff is not given the right under this type of statutory formula to retain stock and also seek damages.

6. Sections 509(e) and (f) are based on a proposed NASAA amendment to the Uniform Securities Act adopted in order "to establish civil liability for individuals who willfully violate Section 102 dealing with fraudulent practices pertaining to advisory activities." Neither provision is intended to limit other state law claims for providing investment advice.

7. Broker-dealer employees, including research analysts, who receive no special compensation from third parties for investment advice would not be liable under Section 509(f).

8. The control liability provision in Section 509(g)(1) is modeled on that in the 1956 Act. On the meaning of "control," see 4 Louis Loss & Joel Seligman, Securities Regulations 1703-1727 (3d ed. rev. 2000).

9. The defense of lack of knowledge in Sections 509(g) is also modeled on the 1956 Act.

10. Under Section 509(g)(2) partners, officers, and directors are liable, subject to the defense afforded by that subsection, without proof that they aided in the sale. In Section 509(g)(2), the term "partner" is intended to be limited to partners with management responsibilities, rather than a partner with a passive investment.

11. Under 509(g)(4), the performance by a clearing broker of the clearing broker's contractual functions — even though necessary to the processing of a transaction — without more would not constitute material aid or result in liability under this subsection. See, e.g., *Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1990).

12. The "reasonable attorneys' fees" specified in Section 509 are permissive, not mandatory. See, e.g., *Andrews v. Blue*, 489 F.2d 367, 377 (10th Cir. 1973), (Colorado statute).

13. The contribution provision in Section 509(h) is a safeguard to avoid the common law principle that prohibited contribution among joint tortfeasors.

14. The statute of limitations in Section 509(j) is a hybrid of the 1956 Act and federal securities law approaches. The 1956 Act Section 410(p) provided that: "No person may sue under this section more than two years after the contract of sale." Under this provision, the state courts generally decline to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling.

Before the July 2002 enactment of the Sarbanes-Oxley Act, Rule 10b-5 of the Securities Exchange Act as construed by the United States Supreme Court in Lampf, Pleva, Lipkind, Prepis & Petigrew v. Gilbertson, 501 U.S. 350 (1991), prohibited equitable tolling under the federal securities law one year after discovery and three years after the act formula. See generally 10 Louis Loss & Joel Seligman, Securities Regulation 4505-4525 (3d. ed. rev. 1996). The Sarbanes-Oxley Act added 28 U.S.C. §1658(b) which provides

> ... a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of —
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Section 509(j)(1), as with the 1956 Act, is a unitary statute of repose, requiring an action to be commenced within one year after a violation occurred. It is not intended that equitable tolling be permitted.

Section 509(j)(2), in contrast, generally follows the federal securities law model. An action must be brought within the earlier of two years after discovery or five years after the violation. As with federal courts construing the statute of limitations under Rule 10b-5, it is intended that the plaintiff's right to proceed is limited to two years after actual discovery "or after such discovery should have been made by the exercise of reasonable diligence" (inquiry notice), see, e.g., *Law v. Medco Research, Inc.*, 113 F.3d 781 (7th Cir. 1997), or five years after the violation.

The rationale for replicating the basic federal statute of limitations in this Act is to discourage forum shopping. If the statute of limitations applicable to Rule 10b-5 were to be changed in the future, identical changes should be made in Section 509(j)(2).

15. Section 509(k) is similar to Section 29(b) of the Securities Exchange Act and is intended to apply only to actions to enforce illegal contracts. See Louis Loss, Commentary on the Uniform Securities Act 150 (1976).

16. Section 509(m) follows the 1956 Act.

17. Section 509 and Section 411(e) provide the exclusive private causes of action under this Act.

30-14-510. Rescission offers. — A purchaser, seller, or recipient of investment advice may not maintain an action under section 30-14-509, Idaho Code, if:

(a) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(1) An offer stating the respect in which liability under section 30-14-509, Idaho Code, may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale, or investment advice;

(2) If the basis for relief under this section may have been a violation of section 30-14-509(b), Idaho Code, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase in cash equal to the damages computed in the manner provided in this subsection;

(3) If the basis for relief under this section may have been a violation of section 30-14-509(c), Idaho Code, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale; or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale;

(4) If the basis for relief under this section may have been a violation of section 30-14-509(d), Idaho Code; and if the customer is a purchaser, an offer to pay as specified in subsection (b) of this section [paragraph (2) of this subsection]; or, if the customer is a seller, an offer to tender or to pay as specified in subsection (c) of this section [paragraph (3) of this subsection];

(5) If the basis for relief under this section may have been a violation of section 30-14-509(e), Idaho Code, an offer to reimburse in cash the consideration paid for the advice and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of payment; or

(6) If the basis for relief under this section may have been a violation of section 30-14-509(f), Idaho Code, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the violation causing the loss;

(b) The offer under subsection (a)(1) [subsection (a)] of this section states that it must be accepted by the purchaser, seller, or recipient of investment advice within thirty (30) days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any shorter period, of not less than three (3) days, that the administrator, by order, specifies;

(c) The offeror has the present ability to pay the amount offered or to tender the security under subsection (a)(1) [subsection (a)] of this section;

(d) The offer under subsection (a)(1) [subsection (a)] of this section is delivered to the purchaser, seller, or recipient of investment advice, or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and

(e) The purchaser, seller, or recipient of investment advice that accepts the offer under subsection (a)(1) [subsection (a)] of this section in a record within the period specified under subsection (a)(2) [subsection (b)] of this section is paid in accordance with the terms of the offer.

History.

I.C., § 30-14-510, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in this section were added by the compiler to correct the statutory references and to conform to the uniform act.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 410(e); RUSA Section 607.

1. A rescission offer must meet the specific requirements of Section 510 for civil liability under Section 509 to be extinguished. Cf. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663, 666 (N.D. Ga. 1990). See generally Rowe, Rescission Offers under Federal and State Securities Law, 12 J. Corp. L. 383 (1987).

2. A rescission offer that does not comply with Section 510 is subject to civil liability, administrative enforcement, or criminal penalties under this Act. A rescission offer, for example, could violate Section 501, the general fraud provision.

3. The administrator may publish a form that would comply with Section 510, but the form would not be the only one that could be used by the parties.

4. A valid rescission offer will be exempt from securities registration. See Section 202(19).

5. If a state chooses to add a notice or filing provision, it could provide this provision in Section 510(6), which would state:

> (6) The offer [or a notice] is required to be filed with the administrator 10 business days before the offering and conform in form and content with a rule prescribed by the administrator.

Part 6. Administration and Judicial Review

30-14-601. Administration. — (a) Administration. The administration of the provisions of this chapter shall be under the general supervision and control of the administrator.

(b) Unlawful use of records or information. It is unlawful for the administrator or an officer, employee, or designee of the administrator to use for personal benefit or the benefit of others records or other information obtained by or filed with the administrator that are not public under section 30-14-607(b), Idaho Code. This chapter does not authorize the administrator or an officer, employee, or designee of the administrator to disclose the record or information, except in accordance with section 30-14-602, 30-14-607(c) or 30-14-608, Idaho Code.

(c) No privilege or exemption created or diminished. This chapter does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(d) Investor education. The administrator may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the administrator may collaborate with public and nonprofit organizations with an interest in investor education. The administrator may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives. This subsection does not authorize the administrator to require participation or monetary contributions of a registrant in an investor education program.

(e) The securities investor education and training fund. The securities investor education and training fund is hereby created to provide funds for the purposes specified in subsection (d) of this section. All moneys received by the state by reason of civil penalties and administrative fines collected pursuant to this chapter shall be deposited in the securities investor education and training fund up to but not exceeding fifty thousand dollars ($50,000) per year. The administrator may use funds in this account in a manner consistent with the duties of the department of finance under this chapter.

History.
I.C., § 30-14-601, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 406; RUSA Sections 701-702.

1. Section 601(b) should be read with Section 607. Section 601(b) prohibits the administrator or the administrator's officers and employees from using for personal benefit records or information that Section 607(b) specifies do not constitute public records. Section 601(b) is not intended to limit the operation of Section 607(a). Neither Section 601(b) nor 607(b) is intended to impede the ability of the agencies specified in Section 608(a) from

sharing records or other information in connection with an examination or an investigation.

2. Section 601(c) makes clear that nothing in this Act alters the availability of evidentiary privileges. That question is left to the general law of the particular state.

3. Sections 601(d) and (e) were adopted in recognition of the importance of investor education. An increasing number of jurisdictions are earmarking specific funds for this purpose. The lack of financial acumen among public investors, seniors, and students continues to be demonstrated in recent industry and regulatory studies. The importance of investor financial literacy is increasingly crucial given the decades long shift from defined benefit retirement plans toward defined contribution plans where employees are left to direct their own retirement accounts.

30-14-602. Investigations and subpoenas. — (a) Authority to investigate. The administrator may:

(1) Conduct public or private investigations within or outside of this state which the administrator considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or an order issued under this chapter, or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the administrator determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

(3) Publish a record concerning an action, proceeding, or an investigation under, or a violation of, this chapter or a rule adopted or an order issued under this chapter if the administrator determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) Administrator powers to investigate. For the purpose of an investigation or proceeding under this chapter, the administrator or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the administrator considers relevant or material to the investigation or proceeding.

(c) Procedure and remedies for noncompliance. If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the administrator under this chapter, the administrator may apply to any court of competent jurisdiction or a court of another state for an order to enforce compliance. The court may:

(1) Hold the person in contempt;

(2) Order the person to appear before the administrator;

(3) Order the person to testify about the matter under investigation or in question;

(4) Order the production of records;

(5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

(6) Impose a civil penalty of not less than five hundred dollars ($500) and not greater than five thousand dollars ($5,000) for each violation; and

(7) Grant any other necessary or appropriate relief.

(d) Application for relief. This section does not preclude a person from applying to any court of competent jurisdiction or a court of another state for

relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) Use immunity procedure. An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the administrator under this chapter or in an action or proceeding instituted by the administrator under this chapter on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the administrator may apply to any court of competent jurisdiction to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) Assistance to securities regulator of another jurisdiction. At the request of a law enforcement or other governmental or regulatory agency or self-regulatory organization, the administrator may provide assistance if the requesting entity states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting regulator administers or enforces. The administrator may provide the assistance by using the authority to investigate and the powers conferred by this section as the administrator determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this state if occurring in this state. In deciding whether to provide the assistance, the administrator may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state, federal or foreign jurisdiction to the administrator on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the administrator to carry out the request for assistance.

History.

I.C., § 30-14-602, as added by 2004, ch. 45, § 2, p. 169.

JUDICIAL DECISIONS

Production of Materials.

In an investigation of a seminar scheme offering $10 million "self-liquidating loans" in exchange for a $4000 fee, the department of finance had the authority to require the materials sought, where there was no assertion that the department was arbitrary or capricious, that its acts were overreaching, or that the action was taken solely to harass the individual conducting the seminar. State ex rel. McEldowney v. Uhl, 111 Idaho 915, 728 P.2d 1324 (1986).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 407; RUSA Section 601.

1. Sections 602 (a) and (b) follow the 1956 Act, which was modeled generally on Sections 21(a) through (d) of the Securities Exchange Act of 1934 as it then read.

2. Standards for issuance of subpoenas have been generally established in federal and state securities law. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4917-4937 (3d ed. rev. 1996) (discussing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) and other cases). The scope of subpoena enforcement in each state is a general matter for judicial determination. Under Section 602, an individual subpoenaed to testify by the administrator is not compelled to testify within the meaning of these sections simply by service of a subpoena. Under Section 602(b) the individual can be subpoenaed and compelled to attend. Once in attendance an individual can assert an evidentiary privilege or exemption, see Section 601(c), including the Fifth Amendment privilege against self-incrimination. If an individual refuses to testify or give evidence, the administrator may apply (or have the appropriate State attorney apply) to the appropriate court for the relief specified in Section 602(c). If the individual invokes the privilege against self-incrimination, Section 602(d) allows the administrator to apply to the appropriate court to compel testimony under the "use immunity" provision barring the record compelled or other evidence obtained from being used in a criminal case. See *People v. District Co. of Arapahoe County*, 894 P.2d 739 (Colo. 1995). The phrase "directly or indirectly" in Section 602(e) is intended to include testimony, other evidence, or other information derived from immunized testimony, statements, records, or evidence.

3. Section 602 is intended to apply generally to securities offers and sales under Article 3 and broker-dealer and investment adviser activity under Article 4, when there is noncompliance with the first sentence of Section 602(c). This subsection does not limit the powers of an administrator under other provisions of this Act.

4. A court may quash a subpoena for good cause under Section 602(d). The court may decline to enforce a subpoena that is arbitrary, capricious, or oppressive.

5. Where appropriate under Section 602(f), an administrator could move to authorize admission of a requesting state's attorney under existing *pro hac vice* rules.

6. Section 602(f) is consistent with the Securities Litigation Uniform Standard Act of 1998 which provides in Section 102(e):

> The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

7. There are limitations on financial institutions being subject to visitorial powers by State officials, such as those affecting national banks contained in 12 U.S.C. 484 and 12 C.F.R. Sec. 7.4000. Law outside this Act may place similar limits on state chartered financial institutions being subjected to visitorial powers. This Act does not negate these limitations.

30-14-603. Civil enforcement. — (a) Civil action instituted by administrator. If the administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this chapter or a rule adopted or an order issued under this chapter, the administrator may maintain an action in any court of competent jurisdiction to enjoin the act, practice, or course of business and to enforce compliance with this chapter or a rule adopted or an order issued under this chapter.

(b) Relief available. In an action under this section and on a proper showing, the court may:

(1) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(2) Order other appropriate or ancillary relief, which may include:

(A) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the administrator, for the defendant or the defendant's assets;

(B) Ordering the administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) Imposing a civil penalty not to exceed ten thousand dollars ($10,000) for each violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act; and

(D) Ordering the payment of prejudgment and postjudgment interest; or

(3) Order such other relief as the court considers appropriate.

(c) No bond required. The administrator shall not be required to post a bond in an action or proceeding under this chapter.

(d) Statute of limitation. If the administrator brings a civil action under this section, such action must be instituted within three (3) years from the discovery by the administrator of the facts constituting the alleged violation.

History.

I.C., § 30-14-603, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 8, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added subsection (d).

JUDICIAL DECISIONS

Decisions Under Prior Law

Intent.

Intent was not an element of securities fraud under subsections (2) and (3) of former § 30-1403. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995). (See now § 30-14-603 and § 30-14-604).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 408; RUSA Section 603

1. Section 408 of the 1956 Act was limited to injunctions. This Section follows RUSA in broadening the civil remedies available when the administrator believes that a violation has occurred. A primary purpose of a broad range of potential sanctions is to enable administrators to better tailor appropriate sanctions to particular misconduct.

2. The administrator alternatively may proceed to seek administrative enforcement under Section 604; to deny, suspend, or revoke a securities registration under Section 306; or to deny, suspend, revoke, or take other action against a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412.

3. Constitutional due process considerations can also be addressed by rulemaking or

incorporation of the applicable administrative procedure act provisions of each jurisdiction. The term "upon a proper showing" has a settled meaning in the federal securities laws. See, e.g., Securities Act of 1933 Section 20(b).

4. As with Sections 509(g)(3) and (4), materially aid in Section 603(a) does not include ministerial or clerical acts.

30-14-604. Administrative enforcement. — (a) Issuance of an order or notice. If the administrator determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter, the administrator may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter;

(2) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under section 30-14-401(b)(1)(D) or (F), Idaho Code, or an investment adviser under section 30-14-403(b)(1)(C), Idaho Code; or

(3) Issue an order under section 30-14-204, Idaho Code.

(b) Summary process. An order under subsection (a) of this section is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the administrator will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within fifteen (15) days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the administrator within thirty (30) days after the date of service of the order, the order, which may include a civil penalty or costs of the investigation if a civil penalty or costs were sought in the statement accompanying the order, becomes final as to that person by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(c) Procedure for final order. If a hearing is requested or ordered pursuant to subsection (b) of this section, a hearing must be held pursuant to chapter 52, title 67, Idaho Code. A final order may not be issued unless the administrator makes findings of fact and conclusions of law in a record pursuant to chapter 52, title 67, Idaho Code. The final order may make final, vacate, or modify the order issued under subsection (a) of this section.

(d) Civil penalty. In a final order under subsection (c) of this section, the administrator may impose a civil penalty not to exceed five thousand dollars ($5,000) for each violation.

(e) Costs. In a final order, the administrator may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or an order issued under this chapter.

(f) Filing of certified final order with court — Effect of filing. If a petition for judicial review of a final order is not filed in accordance with section 30-14-609, Idaho Code, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) Enforcement by court — Further civil penalty. If a person does not comply with an order under this section, the administrator may petition a court of competent jurisdiction to enforce the order. The court may not require the administrator to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than five hundred dollars ($500) but not greater than five thousand dollars ($5,000) for each violation and may grant any other relief the court determines is just and proper in the circumstances.

History.
I.C., § 30-14-604, as added by 2004, ch. 45, § 2, p. 169.

JUDICIAL DECISIONS

Decisions Under Prior Law

Intent.
Intent was not an element of securities fraud under subsections (2) and (3) of former § 30-1403. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995). (See now § 30-14-603 and § 30-14-604).

OFFICIAL COMMENT

Prior Provisions: RUSA Sections 602, 712.

1. Section 604, unlike Section 603, may be initiated by the administrator without prior judicial process or a prior hearing. The section, among other matters, empowers the administrator to act summarily in appropriate circumstances.

2. Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings against registered broker-dealers, agents, investment advisers, or investment adviser representatives under Section 412. All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604.

3. Service of an order or notice under this Section is not effective unless made in accordance with Section 611.

30-14-605. Rules, forms, orders, interpretative opinions, and hearings. — (a) Issuance and adoption of forms, orders, and rules. The administrator may:

(1) Issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records;

(2) By rule, define terms, whether or not used in this chapter but those definitions may not be inconsistent with this chapter; and

(3) By rule, classify securities, persons, and transactions and adopt different requirements for different classes.

(b) Findings and cooperation. Under this chapter, a rule or form may not be adopted or amended, or an order issued or amended, unless the administrator finds that the rule, form, order, or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this chapter. In adopting, amending, and repealing rules and forms, section 30-14-608, Idaho Code, applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of registration statements, applications, reports, and other records, including the adoption of uniform rules, forms, and procedures.

(c) Financial statements. Subject to section 15(h) of the securities exchange act and section 222 of the investment advisers act of 1940, the administrator may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or an order issued under this chapter. A rule adopted or an order issued under this chapter may establish:

(1) Subject to section 15(h) of the securities exchange act and section 222 of the investment advisors act of 1940, the form and content of financial statements required under this chapter;

(2) Whether unconsolidated financial statements must be filed; and

(3) Whether required financial statements must be audited by an independent certified public accountant.

(d) Interpretative opinions. The administrator may provide interpretative opinions or issue determinations that the administrator will not institute a proceeding or an action under this chapter against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this chapter. A rule adopted or an order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations that the administrator will not institute an action or a proceeding under this chapter.

(e) Effect of compliance. A penalty under this chapter may not be imposed for, and liability does not arise from conduct that is engaged in or omitted in good faith believing it conforms to a rule, form, or order of the administrator under this chapter.

(f) Presumption for public hearings. A hearing in an administrative proceeding under this chapter must be conducted in public unless the administrator for good cause consistent with this chapter determines that the hearing will not be so conducted.

History.

I.C., § 30-14-605, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The federal references in subsection (c) of this section are codified as follows: Section 15(h) of the Securities Exchange Act, 15 USCS § 78o(h); and § 222 of the Investment Advisers Act of 1940, 15 USCS § 80b-18a.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 412; RUSA Sections 705, 707.

1. It is anticipated that the administrator will propose amendments or make rules under Section 605(a) to remain coordinate with relevant federal law, as well as appropriate rules of the National Association of Securities Dealers, and to achieve uniformity among the States.

2. Uniform forms such as Form B-D, U-4, U-5, and NF are today common in the securities industry and are authorized by Section 605(b).

3. Section 605(c) refers to generally accepted accounting principles in the United States which currently are promulgated by the Financial Accounting Standards Board and the Securities and Exchange Commission.

4. It is anticipated that the states will employ websites, e-mail or other electronic means to provide notice of proposed rulemaking or adoption of new rules, rule amendments, forms or form amendments, statements of policy or interpretations adopted by the administrator, and issuance of orders to registrants and others who have provided a current e-mail or similar address and expressed an interest in receiving such notice.

5. Section 605(e) does not apply to staff no action or interpretative opinions, but does apply to rules, forms, orders, statements of policy or interpretations adopted by the administrator.

30-14-606. Administrative files and opinions. — (a) Public register of filings. The administrator shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor act; and interpretative opinions or no action determinations issued under this chapter.

(b) Public availability. The administrator shall make all rules, forms, interpretative opinions, and orders available to the public.

(c) Copies of public records. The administrator shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted under this chapter may establish a reasonable charge for furnishing the record or certification. A copy of the record certified or a certificate by the administrator of a record's nonexistence is prima facie evidence of a record or its nonexistence.

History.

I.C., § 30-14-606, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 413; RUSA Section 709.

1. "Record" is defined in Section 102(25).

2. Compliance with a state records law will typically satisfy the requirements of Section 606(a).

30-14-607. Public records — Confidentiality. — (a) Presumption of public records. Except as otherwise provided in subsection (b) of this section, records obtained by the administrator or filed under this chapter, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

(b) Nonpublic records. Records as set forth in section 9-340H, Idaho Code, are not public records and are not available for public examination under subsection (a) of this section.

(c) Administrator discretion to disclose. If disclosure is for the purpose of a civil, administrative, or criminal investigation, action, or proceeding or to a person specified in section 30-14-608(a), Idaho Code, the administrator may disclose a record obtained in connection with an audit or inspection under section 30-14-411(d), Idaho Code, or a record obtained in connection with an investigation under section 30-14-602, Idaho Code.

History.

I.C., § 30-14-607, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: RUSA Section 703; SEC Rule Section 200.80(b)(4); Securities Exchange Act of 1934 Sections 24(d) and (e).

1. Section 607(a) reflects the extensive development of freedom of information and open records laws since the 1956 Act was adopted.

2. Section 607(b) may insulate from public disclosure records or other information that may be available under a state freedom of information or open records act. Unless the state freedom of information or open records act implements a constitutional provision, this Act as the later and more specific enactment should control as a matter of statutory construction. A state may amend its freedom of information act, open records act or this section to eliminate any inconsistencies.

3. Records and other information obtained by an administrator in connection with an audit or inspection under subsection 411(d) or an investigation under Section 602 may be made public in the enforcement action, even if records and other information would otherwise be subject to subsection 607(b)(1).

4. An administrator may orally disclose information under Section 607(c) to a person specified in Section 608(a) for the purposes specified in Section 607(c).

30-14-608. Uniformity and cooperation with other agencies. — (a) Objective of uniformity. The administrator shall, in its discretion, cooperate, coordinate, consult, and, subject to section 30-14-607, Idaho Code, share records and information with the securities regulator of another state, Canada, a Canadian province or territory, a foreign jurisdiction, the securities and exchange commission, the United States department of justice, the commodity futures trading commission, the federal trade commission, the securities investor protection corporation, a self-regulatory organization, a national or international organization of securities regulators, a federal or state banking or insurance regulator, and a governmental law enforcement or regulatory agency to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments.

(b) Policies to consider. In cooperating, coordinating, consulting, and sharing records and information under this section and in acting by rule, order, or waiver under this chapter, the administrator shall, in the admin-

istrator's discretion, take into consideration in carrying out the public interest the following general policies:

(1) Maximizing effectiveness of regulation for the protection of investors;

(2) Maximizing uniformity in federal and state regulatory standards; and

(3) Minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

(c) Subjects for cooperation. The cooperation, coordination, consultation, and sharing of records and information authorized by this section include:

(1) Establishing or employing one (1) or more designees as a central depository for registration and notice filings under this chapter and for records required or allowed to be maintained under this chapter;

(2) Developing and maintaining uniform forms;

(3) Conducting a joint examination or investigation;

(4) Holding a joint administrative hearing;

(5) Instituting and prosecuting a joint civil or administrative proceeding;

(6) Sharing and exchanging personnel;

(7) Coordinating registrations under section 30-14-301, Idaho Code, and sections 30-14-401 through 30-14-404, Idaho Code, and exemptions under section 30-14-203, Idaho Code;

(8) Sharing and exchanging records, subject to section 30-14-607, Idaho Code;

(9) Formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases;

(10) Formulating common systems and procedures;

(11) Notifying the public of proposed rules, forms, statements of policy, and guidelines;

(12) Attending conferences and other meetings among securities regulators, which may include representatives of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and

(13) Developing and maintaining a uniform exemption from registration for small issuers, and taking other steps to reduce the burden of raising investment capital by small businesses.

History.

I.C., § 30-14-608, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov.*

For more on the United States commodity futures trading commission, see *http://www.cftc.gov/index.htm.*

For more on the federal trade commission, see *http://ftc.gov/.*

For more on the securities investor protection corporation, see *http://www.sipc.org/.*

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 415; RUSA Sections 704 and 803; 19(c) of the Securities Act of 1933.

1. Uniformity of regulation among the states and coordination with the Securities and Exchange Commission is a principal objective of this Act. Section 608 is intended to encourage such cooperation to the maximum extent appropriate. Operative phrases such as "shall, in its discretion" in Sections 608(a) and (b) are intended to be precisely coordinate with the directive that Congress gave to the Securities and Exchange Commission in Section 19(c) of the Securities Act of 1933.

2. The goals of uniformity among the states and coordination with related federal regulation, including self regulatory organizations, may be enhanced by greater use of information technology systems such as the Web-CRD, the Investment Adviser Registration Depository (IARD), or the Securities and Exchange Commission Electronic Data Gathering, Analysis and Retrieval System (EDGAR). These types of techniques are consistent with a potential system of "one stop filing" of all federal and state forms that is encouraged by this Act.

3. This Act is intended, to the extent practicable, to be revenue neutral in its impact on existing state laws.

4. Section 608(c) lists some joint or coordinated efforts which might be undertaken. Other appropriate cooperative activities are also encouraged.

5. Court decisions interpreting the securities laws have construed these acts to achieve "broad protection to investors," a remedial approach that "embodies a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299, 301 (1946).

30-14-609. Judicial review. — Judicial review of orders. A final order issued by the administrator under this chapter is subject to judicial review in accordance with chapter 52, title 67, Idaho Code.

History.

I.C., § 30-14-609, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 411; RUSA Section 711(b).

1. The 1956 Act Section 411 specified procedures for judicial review of orders, in part modeled on Section 12 of the Model Administrative Procedure Act, 54 Handbook of National Conference of Commissioners on Uniform State Laws 334 (1944) and partly on Section 25 of the Securities Exchange Act.

2. A rule adopted under this Act may be subject to judicial review in accordance with the state administrative procedure act.

3. In those states in which judicial review of rules is permitted, a state may choose to add Section 609(b). In those states in which judicial review of rules is not permitted, Section 609(b) should be deleted.

30-14-610. Jurisdiction. — (a) Sales and offers to sell. Sections 30-14-301, 30-14-302, 30-14-401(a), 30-14-402(a), 30-14-403(a), 30-14-404(a), 30-14-501, 30-14-506, 30-14-509 and 30-14-510, Idaho Code, do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) Purchases and offers to purchase. Sections 30-14-401(a), 30-14-402(a), 30-14-403(a), 30-14-404(a), 30-14-501, 30-14-506, 30-14-509 and 30-14-510, Idaho Code, do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) Offers in this state. For the purpose of this section, an offer to sell or

to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

(1) Originates from within this state; or

(2) Is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) Acceptances in this state. For the purpose of this section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance:

(1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and

(2) Has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) Publications, radio, television, or electronic communications. An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state, or that is published in this state but has had more than two-thirds (2/3) of its circulation outside this state during the previous twelve (12) months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program, or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:

(1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;

(2) The program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;

(3) The program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or

(4) The program or communication consists of an electronic communication that originates in this state, but which is not intended for distribution to the general public in this state.

(f) Investment advice and misrepresentations. Sections 30-14-403(a), 30-14-404(a), 30-14-405(a), 30-14-502, 30-14-505 and 30-14-506, Idaho Code, apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state.

History.

I.C., § 30-14-610, as added by 2004, ch. 45, § 2, p. 169.

OFFICIAL COMMENT

Source of Law: 1956 Act Section 414; RUSA Section 801.

1. Section 610 defines the application of the Act to interstate or international transactions when only some of the elements of a violation occur in this State. This Section applies to all types of proceedings specified by the Act — administrative, civil, and criminal. The law is now settled that a person may violate the law of a particular state without ever being within the state or performing each act necessary to violate the law within that state.

2. Section 610 generally follows Section 414 of the 1956 Act, but has been modernized to reflect the development of the Internet and other electronic communications after 1956.

3. Section 610 can be illustrated in the context of a civil action under Section 509(b) by a purchaser in State A against a seller in State B:

Section 610(a) would apply when an "offer to sell is made in this State."

Section 610(c) provides that an offer which originates in State B and is directed to State A is made in both states. The securities act of State A would apply under Section 610(c)(2). The act of State B would apply also, under Section 610(c)(1). The intent is to prevent a seller in State B from using that state as a base of operations for defrauding person in other states.

Section 610(e) addresses offers made through publications, radio, television, or electronic communications. The subsection provides a series of safe harbors for advertisements in newspapers, magazines, radio, television, or electronic media that either originate outside State A or that originate in State A but are directed outside the state to the general public. With respect to bona fide newspapers or other publications of general, regular, and paid circulation, the safe harbor requires that more than two thirds of its circulation be outside State A. With respect to radio, television, or other electronic communications, safe harbors are specified in Sections 610(e)(1) through (4).

Section 610(d), however, provides that a person in State A who makes an offer to purchase as a result of communication described in Section 610(e) may cause the act to be applicable if the offeror accepts the offer "in this State." Section 610(d) defines when an offer is accepted "in this State."

If a selling broker-dealer in State B solely sends a confirmation into State A, or the purchaser in State A sends a check from within State A, the act will not apply unless, under Section 610(d), the confirmation or delivery constitutes the seller's acceptance of the purchaser's offer to buy in State A.

The applicability of the act to purchaser is addressed by Section 610(b) which is the converse of Section 610(a). Under Section 509(c) there can be liability of purchasers to sellers.

Section 610(f) is a new provision that specifies jurisdictions in cases involving investment advice and misrepresentations.

4. Under subsection 202(20) certain out-of-state offers or sales are exempt from securities registration.

5. The phrase "other electronic means" is coextensive with computer or other information technology permitted by subsections 102(8), 102(25).

6. Under Section 610 the administrator may adopt interpretative rules or orders to specify when particular uses of new electronic communications, including the Internet, involve an offer to sell or to purchase a security, acceptance of an order to purchase or sell a security, or an act or practice involving prohibited conduct, within a State, whether or not a purchaser, seller, or other party is then present in the State. The NASAA Interpretive Order Concerning Broker-Dealers, Agents, and Investment Adviser Representatives Using the Internet for General Dissemination of Information for Products and Services (Apr. 23, 1997) is an illustration of an interpretative order that would be in compliance with the administrator's authority under Section 610. Under this Order, broker-dealers, agents, investment advisers, and investment adviser representatives who distribute information on available products and services through communications on the Internet generally to anyone having access to the Internet such as postings on a bulletin board or home page shall not be deemed to be transacting business in a State if specified conditions are satisfied including a legend clearly stating that the broker-dealer, agent, investment adviser, or investment adviser representative may transact business in that State only if first registered, excluded or exempted from applicable registration requirements.

30-14-611. Service of process. — (a) Signed consent to service of process. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this chapter or a rule adopted or an order issued under this chapter after the consent is filed,

has the same force and validity as if the service were made personally on the person filing the consent. Registrants shall be required to submit a consent to service of process only if there has been a material change.

(b) Conduct constituting appointment of agent for service. If a person, including a nonresident of this state, engages in an act, practice, or course of business prohibited or made actionable by this chapter or a rule adopted or an order issued under this chapter and the person has not filed a consent to service of process under subsection (a) of this section, the act, practice, or course of business constitutes the appointment of the administrator as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.

(c) Procedure for service of process. Service under subsection (a) or (b) of this section may be made by providing a copy of the process to the office of the administrator, but it is not effective unless:

(1) The plaintiff, which may be the administrator, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and

(2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the administrator in a proceeding before the administrator, allows.

(d) Service in administrative proceedings or civil actions by administrator. Service pursuant to subsection (c) of this section may be used in a proceeding before the administrator or by the administrator in a civil action in which the administrator is the moving party.

(e) Opportunity to defend. If process is served under subsection (c) of this section, the court, or the administrator in a proceeding before the administrator, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

History.

I.C., § 30-14-611, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 3, p. 423; am. 2012, ch. 65, § 9, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, deleted the former second sentence in subsection (a), which read: "From September 1, 2004, through June 30, 2005, all persons applying for registration or making a notice filing shall submit to the administrator a signed consent to service of process."

The 2012 amendment, by ch. 65, deleted "From July 1, 2005, and thereafter" from the beginning of the last sentence in subsection (a).

OFFICIAL COMMENT

Prior Provisions: 1956 Act Sections 414(g) and (h); RUSA Section 708.

1. Section 611 follows the 1956 Act and RUSA in providing for a signed consent to service of process in Section 611(a); a substituted service of process in Section 611(b); and process and opportunity to defend in Sections 611(c) through (e).

2. An issuer is not required to file a consent to service of process unless it proposes to offer a security in this State through someone acting on an agency basis. Since the civil

liability provisions of Section 509(b) apply only in a suit by a purchaser against a seller, the issuer in a firm commitment underwriting is civilly liable only to the underwriter, who, in turn, may be liable to the dealer, who, in turn, may be liable to the purchaser. In contrast, in a best efforts underwriting, when the security is sold on an agency basis and title passes directly to the purchaser, the issuer can be liable to the purchaser.

3. Section 611(b) generally follows Section 414(h) of the 1956 Act and Section 708(c) of RUSA. The intent is to provide for substituted service of process when a seller in one state directs an offer into a second state either in violation of the laws of the second state or fraudulently. Under Section 611(b) the purchaser may sue the seller in the purchaser's state and then bring an action on the judgment in the seller's state. The constitutionality of this type of statute has long been sustained.

4. This section was originally based on the type of nonresident motorist statute whose constitutionality was sustained in *Hess v. Pawlowski*, 274 U.S. 352 (1927) and subsequently in other contexts. See, e.g., *International Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945); *Travelers Health Ass'n v. Commonwealth of Va.*, 339 U.S. 643 (1950).

30-14-612. Severability clause. — If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History.
I.C., § 30-14-612, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 2004, ch. 45, which is codified as §§ 9-340H, 18-7803, 30-14-101 to 30-14-703, 39-1452, 41-1004, and 41-3821.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 417; RUSA Section 805.

Part 7. Transition

30-14-701. Effective date. — This act takes effect on September 1, 2004.

History.
I.C., § 30-14-701, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 2004, ch. 45, which is codified as §§ 9-340H, 18-7803, 30-14-101 to 30-14-703, 39-1452, 41-1004, and 41-3821.

30-14-702. Repeals. — The following chapter is repealed: The Idaho securities act, chapter 14, title 30, Idaho Code.

History.
I.C., § 30-14-702, as added by 2004, ch. 45, § 2, p. 169.

30-14-703. Application of chapter to existing proceeding and existing rights and duties. — (a) Applicability of predecessor act to pending proceedings and existing rights. The predecessor act exclusively governs all actions or proceedings that are pending on the effective date of this act or may be instituted on the basis of conduct occurring before the effective date of this act, but a civil action may not be maintained to enforce any liability under the predecessor act unless instituted within any period of limitation that applied when the cause of action accrued or within five (5) years after the effective date of this act, whichever is earlier.

(b) Continued effectiveness under predecessor act. All effective registrations under the predecessor act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations under the predecessor act remain in effect while they would have remained in effect if this act had not been enacted. They are considered to have been filed, issued, or imposed under this act, but are exclusively governed by the predecessor act.

(c) Applicability of predecessor act to offers or sales. The predecessor act exclusively applies to an offer or sale made within one (1) year after the effective date of this act pursuant to an offering made in good faith before the effective date of this act on the basis of an exemption available under the predecessor act.

History.
I.C., § 30-14-703, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 2004, ch. 45, which is codified as §§ 9-340H, 18-7803, 30-14-101 to 30-14-703, 39-1452, 41-1004, and 41-3821.

The phrase "the effective date of this act" refers to the effective date of S.L. 2004, ch. 45, which was September 1, 2004.

OFFICIAL COMMENT

Prior Provisions: 1956 Act Section 418; RUSA Section 807.

Prior law governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of a State blue sky statute. See *Hilton v. Mumaw*, 522 F.2d 588, 600 (9th Cir. 1975).

CHAPTER 15

IDAHO COMMODITY CODE

30-1501. Definitions. — (1) "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange or other form of marketplace.

(2) "CFTC rule" means any rule, regulation or order of the commodity futures trading commission in effect on the effective date of this chapter and all subsequent amendments, additions or other revisions thereto, unless the director, within thirty (30) days following the effective date of any such amendment, addition or revision, disallows the application thereof to any provision of this chapter by rule, regulation or order.

(3) "Commodity" means, except as otherwise specified by the director by rule, regulation or order, any agricultural, grain or livestock product or by-product, any metal or mineral including a precious metal as defined in subsection (13) of this section, any gem or gemstone whether characterized as precious, semiprecious or otherwise, any fuel whether liquid, gaseous or otherwise, any foreign currency, and all other goods, articles, products or items of any kind of any other commodity as defined in the commodity exchange act or commodity futures trading commission rules; provided that the term commodity shall not include:

(a) A numismatic coin whose fair market value is at least fifteen per cent (15%) higher than the value of the metal it contains;

(b) Real property or any timber, agricultural or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property; or

(c) Any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner thereof.

(4) "Commodity contract" means:

(a) Any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract or otherwise. Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes; and

(b) Does not include any contract or agreement which requires, and under which the purchaser receives, within twenty-eight (28) calendar days from the payment in good funds of any portion of the purchase price,

physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(5) "Commodity exchange act" means the act of congress known as the commodity exchange act, as amended, codified at 7 U.S.C. section 1, et seq. and all subsequent amendments, additions or other revisions thereto, unless the director, within thirty (30) days following the effective date of any such amendment, addition or revision, disallows the application thereof to any provision of this chapter by rule, regulation or order.

(6) "Commodity futures trading commission" means the independent regulatory agency established by congress to administer the commodity exchange act.

(7) "Commodity merchant" means any of the following as defined or described in the commodity exchange act or by CFTC rule:

(a) Futures commission merchant,

(b) Commodity pool operator,

(c) Commodity trading adviser,

(d) Introducing broker,

(e) Leverage transaction merchant,

(f) An associated person of any of the foregoing,

(g) Floor broker, and

(h) Any other person, other than a futures association, required to register with the commodity futures trading commission.

(8) "Commodity option" means:

(a) Any account, agreement or contract giving a party thereto the right, but not the obligation, to purchase or sell one or more commodities or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise; and

(b) Does not include an option traded on a national securities exchange registered with the United States securities and exchange commission.

(9) "Director" means the director of the Idaho department of finance or an agent or employee authorized to act on the director's behalf.

(10) "Financial institution" means a bank, savings institution or trust company organized under, or supervised pursuant to the laws of the United States or this state.

(11) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

(12) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government, but shall not include a contract market designated by the commodity futures trading commission or any clearinghouse thereof or a national securities exchange registered with the securities and exchange commission, or any employee, officer or director of such contract market, clearinghouse or exchange acting solely in that capacity.

(13) "Precious metal" means the following in either coin, bullion or other form:

(a) Silver,
(b) Gold,
(c) Platinum,
(d) Palladium,
(e) Copper, and
(f) Such other items as the director may specify by rule.

(14) "Sale" or "sell" includes every sale, contract of sale, contract to sell, or disposition, for value.

History.
I.C., § 30-1501, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Cross References.
Department of finance, § 67-2701 et seq.

Prior Laws.
Former §§ 30-1501 to 30-1513, which were compiled from 1975, ch. 248, § 1, p. 66; 1980, ch. 135, §§ 1 to 3, p. 294; 1982, ch. 139, § 1, p. 393; 1984, ch. 47, § 16, p. 76, were repealed by S.L. 1986, ch. 149, § 1.

Another former §§ 30-1501 to 30-1514, which comprised S.L. 1986, ch. 149, § 2, p. 425, were repealed by S.L. 1988, ch. 84, § 1.

Compiler's Notes.
For more on the commodity futures trading commission, see *http://www.cftc.gov/index.htm* and 7 U.S.C.S. § 2.

For more on the securities and exchange commission, see *http://www.sec.gov/* and 15 U.S.C.S. § 78d.

The phrase "the effective date of this chapter" refers to the effective date of S.L. 1989, ch. 414, which was July 1, 1989.

30-1502. Unlawful commodity transactions. — Except as otherwise provided in sections [section] 30-1503 or 30-1504, Idaho Code, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option.

History.
I.C., § 30-1502, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1502 was repealed. See Prior Laws, § 30-1501.

Compiler's Notes.
The bracketed insertion in this section was added by the compiler to correct the syntax of the statutory reference.

30-1503. Exempt person — Transactions. — (1) The prohibitions in section 30-1502, Idaho Code, shall not apply to any transaction offered by and in which any of the following persons or any employee, officer or director thereof, acting solely in that capacity is the purchaser or seller:

(a) A person registered with the commodity futures trading commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(b) A person registered with the securities and exchange commission or under the laws of this state as a securities broker-dealer whose activities require such registration;

(c) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by a person referred to in paragraph (a) or (b) of this subsection;

(d) A person who is a member of a contract market designated by the commodity futures trading commission or any clearinghouse thereof; or

(e) A financial institution.

(2) The exemption provided in this section shall not apply to any transaction or activity which is prohibited by the commodity exchange act or CFTC rule.

History.
I.C., § 30-1503, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1503 was repealed. See Prior Laws, § 30-1501.

30-1504. Exempt transactions. — (1) The prohibitions in section 30-1502, Idaho Code, shall not apply to the following:

(a) An account, agreement or transaction within the exclusive jurisdiction of the commodity futures trading commission as granted under the commodity exchange act;

(b) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within seven (7) calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such seven (7) day period, such quantity of precious metals purchased by such payment is delivered whether in specifically segregated or fungible bulk form into the possession of a depository, other than the seller, which is either:

(i) A financial institution,

(ii) A depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the commodity futures trading commission,

(iii) A storage facility licensed or regulated by the United States or any agency thereof, or

(iv) A depository designated by the director, and such depository or other person which itself qualifies as a depository as aforesaid, issues and the purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all

liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(c) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject thereto, or any by-product; or

(d) A commodity contract under which the offeree or the purchaser is a person referred to in section 30-1503, Idaho Code, an insurance company, or an investment company as defined in the investment company act of 1940.

(2) The director may issue rules, regulations or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this chapter which are not within the exclusive jurisdiction of the commodity futures trading commission as granted by the commodity exchange act, exempting any person or transaction from any provision of this chapter conditionally or unconditionally and otherwise implementing the provisions of this chapter for the protection of purchasers and sellers of commodities.

History.
I.C., § 30-1504, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1504 was repealed. See Prior Laws, § 30-1501.

Federal References.
The investment company act of 1940, referred to in paragraph (1)(d), is codified as 15 U.S.C.S. § 80a-1 et seq.

30-1505. Unlawful commodity activities. — (1) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person:

(a) Is registered or temporarily licensed with the commodity futures trading commission for each activity constituting such person as a commodity merchant and such registration or temporary license shall not have expired, nor been suspended nor revoked; or

(b) Is exempt from such registration by virtue of the commodity exchange act or of a CFTC rule.

(2) No board of trade shall trade, or provide a place for the trading of, any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the commodity futures trading commission unless such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, nor suspended nor revoked.

History.
I.C., § 30-1505, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1505 was repealed. See Prior Laws, § 30-1501.

30-1506. Fraudulent conduct — Liability of principals, controlling persons and others. — (1) It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option:

(a) To employ any device, scheme or artifice to defraud;

(b) To make any false report, enter any false record or make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(c) To engage in any transaction, act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or

(d) To misappropriate or convert the funds, security or property of any other person.

(2) The act, omission or failure of any person acting for any individual, association, partnership, corporation or trust within the scope of the person's employment or office shall be deemed the act, omission or failure of the individual, association, partnership, corporation or trust, as well as of the person.

(3) Every person who directly or indirectly controls another person liable under any provision of this chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person who is also liable by virtue of this provision sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

History.
I.C., § 30-1506, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1506 was repealed. See Prior Laws, § 30-1501.

30-1507. Securities statutes unaffected. — Nothing in this chapter shall impair, derogate or otherwise affect the authority or powers of the director under the Idaho securities act [uniform securities act (2004)] or the application of any provision thereof to any person or transaction subject thereto.

History.
I.C., § 30-1507, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1507 was repealed. See Prior Laws, § 30-1501.

Compiler's Notes.
The bracketed insertion was added by the compiler, as the Idaho securities act was repealed in 2004 and replaced by the uniform securities act (2004). See § 30-14-101 et seq.

30-1508. Purpose. — The provisions of this chapter may be construed and implemented to effectuate the general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts and to maximize coordination with federal law and laws of other states and the administration and enforcement thereof. The provisions of this chapter are not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this chapter.

History.
I.C., § 30-1508, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1508 was repealed. See Prior Laws, § 30-1501.

30-1509. Investigations. — (1) The director may make investigations, within or outside this state, as the director deems necessary or appropriate to:

(a) Determine whether any person has violated, or is about to violate, any provision of this chapter or any rule or order hereunder; or

(b) Aid in enforcement of the provisions of this chapter.

(2) The director may publish information concerning any violation of the provisions of this chapter or any rule or order of the director.

(3) For purposes of any investigation or proceeding under this chapter, the director or any officer or employee designated by him, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director deems to be relevant or material to the inquiry.

(4)(a) If a person does not give testimony or produce the documents required by the director pursuant to an administrative subpoena, the director may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.

(b) The request for order of compliance may be addressed to any court of competent jurisdiction, within or outside the state.

History.
I.C., § 30-1509, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1509 was repealed. See Prior Laws, § 30-1501.

30-1510. Enforcement. — (1) If the director believes, whether or not based upon an investigation conducted under section 30-1509, Idaho Code, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order hereunder, the director may:

(a) Issue a cease and desist order;

(b) Issue an order imposing a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation or one hundred thousand dollars ($100,000) for multiple violations in a single proceeding or a series of related proceedings; or

(c) Initiate any of the actions specified in subsection (2) of this section.

(2) The director may institute any of the following actions in the appropriate courts of this state, or in the appropriate courts of another state, in addition to any legal or equitable remedies otherwise available:

(a) An action for a declaratory judgment;

(b) An action for a permanent or temporary injunction, restraining order or writ of mandamus to enjoin the violation and to ensure compliance with the provisions of this chapter or any rule or order of the director;

(c) An action for disgorgement and other equitable remedies; and

(d) An action for appointment of a receiver or conservator for the defendant or the defendant's assets.

History.
I.C., § 30-1510, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1510 was repealed. See Prior Laws, § 30-1501.

30-1511. Power of court to grant relief. —

(1)(a) Upon a showing by the director that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the director, the court may grant appropriate legal or equitable remedies.

(b) Upon a showing of violation of the provisions of this chapter or a rule or order of the director, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(i) Imposition of a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation or one hundred thousand dollars ($100,000) for multiple violations in a single proceeding or a series of related proceedings;

(ii) Disgorgement;
(iii) Declaratory judgment;
(iv) Restitution to investors wishing restitution; and
(v) Appointment of a receiver or conservator for the defendant or the defendant's assets.

(c) Appropriate remedies when the defendant is shown only about to violate the provisions of this chapter or a rule or order of the director shall be limited to:

(i) A temporary restraining order;
(ii) A temporary or permanent injunction;
(iii) A writ of prohibition or mandamus; or
(iv) An order appointing a receiver or conservator for the defendant or the defendant's assets.

(2) The court shall not require the director to post a bond in any official action under this chapter.

(3)(a) Upon a proper showing by the director or securities or commodity agency of another state that a person, other than a government or governmental agency or instrumentality, has violated, or is about to violate, any provision of the commodity act of that state or any rule or order of the director or securities or commodity agency of that state, the court may grant appropriate legal and equitable remedies.

(b) Upon a showing of a violation of the securities or commodity act of the foreign state or a rule or order of the director or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies including temporary restraining orders, permanent or temporary injunctions and writs of prohibition or mandamus, may grant the following special remedies:

(i) Disgorgement; and
(ii) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in the state.

(c) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a rule or order of the director or securities or commodity agency of the foreign state shall be limited to:

(i) A temporary restraining order;
(ii) A temporary or permanent injunction;
(iii) A writ of prohibition or mandamus; or
(iv) An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

History.

I.C., § 30-1511, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.
Former § 30-1511 was repealed. See Prior Laws, § 30-1501.

30-1512. Criminal penalties. — (1) Any person who willfully violates:

(a) Any provision of this chapter; or

(b) Any rule or order of the director under this chapter shall, upon conviction, be fined not more than twenty-five thousand dollars ($25,000) or imprisoned for not more than ten (10) years, or both, for each violation.

(2) Any person convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the person proves he had no knowledge of the rule or order.

(3) The director may refer such evidence as is available concerning violations of the provisions of this chapter or any rule or order of the director to the attorney general of this state or the proper prosecuting attorney, who may, with or without such a reference from the director, institute the appropriate criminal proceedings under this chapter.

History.
I.C., § 30-1512, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Cross References.
Attorney general, § 67-1401 et seq.

Prior Laws.
Former § 30-1512 was repealed. See Prior Laws, § 30-1501.

30-1513. Administration — Rules and forms. — (1) The administration of the provisions of this chapter shall be under the general supervision and control of the director. The director may from time to time make, amend and rescind such rules and forms as are necessary to carry out the provisions of this chapter. No rule or form may be made unless the director finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes of this chapter.

(2) Neither the director nor any employees of the director shall use any information which is filed with or obtained by the director which is not public information for personal gain or benefit, nor shall the director nor any employees of the director conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate such information.

(3)(a) Except as provided in paragraph (b) of this subsection, all information collected, assembled or maintained by the director is public information and is available for the examination of the public.

(b) The following items are not public information and are deemed to be confidential:

(i) Information or documents obtained by the director concerning any matter or party under investigation;

(ii) Information designated as confidential by any rule or order of the director;

(iii) Information obtained from federal agencies which may not be disclosed under federal law.

(c) The director in his discretion may disclose any information made confidential under paragraph (b)(i) of this subsection to persons identified in section 30-1514, Idaho Code.

(d) No provision of this chapter either creates or derogates any privilege which exists at common law, by statute or otherwise when any documentary or other evidence is sought under subpoena directed to the director or any employee of the director.

History.

I.C., § 30-1513, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1513 was repealed. See Prior Laws, § 30-1501.

30-1514. Cooperation with other agencies. — To encourage uniform application and interpretation of the provisions of this chapter and securities regulation and enforcement in general, the director and the employees of the director may cooperate, including bearing the expense of the cooperation, with the securities agencies or director of another jurisdiction, Canadian province or territory or such other agencies administering the provisions of this chapter, the commodity futures trading commission, the securities and exchange commission, any self-regulatory organization established under the commodity exchange act or the securities exchange act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

History.

I.C., § 30-1514, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1514 was repealed. See Prior Laws, § 30-1501.

Federal References.

The securities exchange act of 1934 is codified as 15 U.S.C.S. § 78a et seq.

30-1515. Consent to service of process. — When a person including a nonresident of this state, engages in conduct prohibited or made actionable by the provisions of this chapter or any rule or order of the director, such conduct shall constitute the appointment of the director and his successors as the person's attorney to receive service of any lawful process in

a noncriminal proceeding against the person, a successor, or personal representative, which grows out of that conduct and which is brought under this chapter or any rule or order of the director with the same force and validity as if served personally.

History.
I.C., § 30-1515, as added by 1989, ch. 414, § 1, p. 1006.

30-1516. Scope. — (1) Sections 30-1502, 30-1505 and 30-1506, Idaho Code, apply to persons who sell or offer to sell when:

(a) An offer to sell is made in this state, or

(b) An offer to buy is made and accepted in this state.

(2) Sections 30-1502, 30-1505 and 30-1506, Idaho Code, apply to persons who buy or offer to buy when:

(a) An offer to buy is made in this state, or

(b) An offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:

(a) Originates from this state, or

(b) Is directed by the offeror to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer.

(4) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance:

(a) Is communicated to the offeror in this state, and

(b) Has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state, reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when:

(a) The publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state, but more than two-thirds of the publication's circulation has been outside this state during the previous twelve (12) months, or

(b) A radio or television program originating outside this state is received in this state.

History.
I.C., § 30-1516, as added by 1989, ch. 414, § 1, p. 1006.

30-1517. Procedure for entry of an order. — (1) The director shall commence an administrative proceeding under this chapter by entering

either a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but must be in writing.

(2) Upon entry of a notice of intent or summary order, the director shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the director shall inform all interested parties of the date, time and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the director shall inform all interested parties that they have thirty (30) business days from the entry of the order to file a written request for a hearing on the matter with the director and that the hearing will be scheduled to commence within thirty (30) business days after the receipt of the written request.

(3) If the proceeding is pursuant to a summary order, the director, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the director's own motion.

(4) If no hearing is requested and none is ordered by the director, the summary order will automatically become a final order after thirty (30) business days.

(5) If a hearing is requested or ordered, the director, after notice of an opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination.

(6) No final order or order after hearing may be returned without:

(a) Appropriate notice to all interested persons;

(b) Opportunity for hearing by all interested persons; and

(c) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under the provisions of this chapter shall be public unless the director grants a request joined in by all the respondents that the hearing be conducted privately.

History.

I.C., § 30-1517, as added by 1989, ch. 414, § 1, p. 1006.

30-1518. Judicial review of orders. — Any person aggrieved by a final order of the director may obtain judicial review of the order pursuant to the provisions of chapter 52, title 67, Idaho Code.

History.

I.C., § 30-1518, as added by 1989, ch. 414, § 1, p. 1006; am. 1993, ch. 216, § 15, p. 587.

30-1519. Pleading exemptions. — It shall not be necessary to negative any of the exemptions in this chapter in any complaint, information or indictment, or any writ or proceeding brought under this chapter, and the burden of proof of any such exemption shall be upon the party claiming the same.

History.
I.C., § 30-1519, as added by 1989, ch. 414, § 1, p. 1006.

30-1520. Short title. — This chapter shall be known and may be cited as the "Idaho Commodity Code."

History.
I.C., § 30-1520, as added by 1989, ch. 414, § 1, p. 1006.

CHAPTER 16

CONTROL SHARE ACQUISITION ACT

30-1601. Definitions. — In this chapter the following terms have the meaning specified:

(1) "Acquiring person" means a person that makes or proposes to make a control share acquisition. If two (2) or more persons act as a partnership, limited partnership, syndicate or other group pursuant to any agreement, arrangement, relationship, understanding or otherwise, whether or not in writing, for the purposes of acquiring, owning or voting shares of an issuing public corporation, all members of the partnership, syndicate or other group constitute a "person." An "acquiring person" does not include a licensed broker or dealer or licensed underwriter that purchases shares of an issuing public corporation solely for purposes of resale to the public and is not acting in concert with an acquiring person.

(2) "Affiliate" means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.

(3) "Associate," when used to indicate a relationship with any person, means:

(a) Any corporation or organization of which the person is an officer, director or partner or is, directly or indirectly, the beneficial owner of ten per cent (10%) or more of any class or series of shares entitled to vote or other equity interests;

(b) Any trust or estate in which the person has a ten per cent (10%) or more beneficial interest or as to which the person serves as trustee or personal representative or in a similar fiduciary capacity; or

(c) Any relative or spouse of the person, or any relative of the spouse, residing in the home of the person.

(4) "Beneficial owner," when used with respect to shares or other securities, includes any person who, directly or indirectly, through any agreement, arrangement, relationship, understanding or otherwise, whether or not in

writing, has or shares the power to vote, or direct the voting of, the shares or securities or has or shares the power to dispose of, or direct the disposition of, the shares or securities, except that:

(a) A person is not deemed the beneficial owner of shares or securities tendered pursuant to a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares or securities are accepted for purchase or exchange or payment, or purchased or exchanged; and

(b) A person is not deemed the beneficial owner of shares or securities with respect to which the person has the power to vote or direct the voting arising solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Securities Exchange Act of 1934, as amended, and is not then reportable under that act on a schedule 13D or comparable report under that act.

(5) "Beneficial ownership" includes the right to acquire shares or securities through the exercise of options, warrants or rights, the conversion of convertible securities or otherwise, regardless of whether exercisable only after the passage of time (whether or not less than sixty (60) days) or the occurrence or nonoccurrence of a future event. The shares or securities subject to the options, warrants, rights or conversion privileges held by a person are deemed to be outstanding for the purpose of computing the percentage of outstanding shares or securities of the class or series owned by the person but are not deemed to be outstanding for the purpose of computing the percentage of the class or series owned by any other person. A person is deemed the beneficial owner of shares and securities beneficially owned by an affiliate or associate of the person.

(6) "Business combination," when used in reference to any issuing public corporation and any interested shareholder of the issuing public corporation, means:

(a) Any merger or consolidation of the issuing public corporation or any subsidiary of the issuing public corporation with either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the merger would be, an affiliate or associate of the interested shareholder, except that the foregoing does not include the merger of a wholly owned subsidiary of the issuing public corporation into the issuing public corporation or the merger of two (2) or more wholly owned subsidiaries of the issuing public corporation; or

(b) Any exchange, pursuant to a plan of exchange under the laws of this state or a comparable statute of any other state or jurisdiction, of shares of the issuing public corporation or any subsidiary of the issuing public corporation for shares of either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the exchange would be, an affiliate or associate of the interested shareholder; or

(c) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in a single transaction or a series of transactions, to or with the interested shareholder or any affiliate or associate of the interested shareholder, whether as part of a dissolution or otherwise, of assets of the issuing public corporation or any subsidiary of the issuing public corporation to which any of the following applies:

1. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation;
2. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation; or
3. Represents ten per cent (10%) or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation; or

(d) Any transaction which results in the issuance or transfer by the issuing public corporation or any subsidiary of the issuing public corporation, in a single transaction or a series of transactions, of any shares of the issuing public corporation that have an aggregate market value equal to five per cent (5%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation to the interested shareholder or any affiliate or associate of the interested shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered or distributed or a dividend or distribution paid or made pro rata to all shareholders of the issuing public corporation, and except pursuant to the exercise or conversion of securities exercisable for or convertible into shares of the issuing public corporation or any subsidiary of the issuing public corporation which securities were outstanding prior to the time that the interested stockholder became such; or

(e) The adoption of any plan or proposal for the liquidation or dissolution of the issuing public corporation, or any reincorporation of the issuing public corporation in another state or jurisdiction, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder; or

(f) Any transaction involving any reclassification of securities, including any share dividend or split, reverse share split or other distribution of shares in respect of shares, recapitalization of the issuing public corporation, merger or consolidation of the issuing public corporation with any subsidiary of the issuing public corporation, exchange of shares of the issuing public corporation with any subsidiary of the issuing public corporation or other transaction, whether or not with or into or otherwise involving the interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associates of the interested shareholder that has the effect directly, or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of shares entitled to vote, or securities that are exchangeable for

or convertible into or that carry a right to acquire shares entitled to vote, of the issuing public corporation or any subsidiary of the issuing public corporation that is, directly or indirectly, owned by the interested shareholder of any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(g) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the issuing public corporation, of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through the issuing public corporation or any subsidiary of the issuing public corporation.

(7) "Control," "controlling," "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. A person's beneficial ownership of ten per cent (10%) or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation. A person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of avoiding the provisions of this chapter, as an agent, bank, broker, nominee, custodian or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

(8) "Control share acquisition" means an acquisition, directly or indirectly, by an acquiring person of beneficial ownership of shares of an issuing public corporation that, except for the provisions of this chapter, would, when added to all other shares of the issuing public corporation, beneficially owned by the acquiring person, entitle the acquiring person, immediately after the acquisition, to exercise or direct the exercise of a new range of voting power within any of the ranges specified in section 30-1604(1)(d), Idaho Code, but does not include any of the following:

(a) An acquisition by a donee pursuant to an inter vivos gift not made to avoid the provisions of this chapter or by a distributee as defined in section 15-1-201, Idaho Code;

(b) An acquisition pursuant to a security agreement not created to avoid the provisions of this chapter;

(c) An acquisition from the issuing public corporation; and

(d) An acquisition for the benefit of others by a person acting in good faith and not made to avoid the provisions of this chapter to the extent that the person may not exercise or direct the exercise of voting power or disposition of the shares except on the instruction of others.

All shares, the beneficial ownership of which is acquired within a one hundred twenty (120) day period, and all shares, the beneficial ownership of which is acquired pursuant to a plan to make a control share acquisition, are deemed to have been acquired in the same acquisition.

(9) "Day" means a calendar day and shall consist of the time period from 12:01 a.m. through 12:00 midnight, Idaho time.

(10) "Interested shareholder," when used in reference to any issuing

public corporation, means any person, other than the issuing public corporation or any subsidiary of the issuing public corporation, that is either:

(a) The beneficial owner, directly or indirectly, of ten per cent (10%) or more of the voting power of the outstanding shares entitled to vote of the issuing public corporation; or

(b) An affiliate or associate of the issuing public corporation.

(11) "Interested shares" mean the shares of an issuing public corporation with respect to which any of the following persons may exercise or direct the exercise of voting power in the election of directors of the issuing public corporation:

(a) An acquiring person;

(b) Any officer of the issuing public corporation; or

(c) Any director of the issuing public corporation.

(12) "Issuing public corporation" means a publicly held corporation which has at least fifty (50) shareholders and which either:

(a) Is incorporated under the laws of this state; or

(b)(i) Has a place of business or its principal executive office located in this state, (ii) owns or controls assets located within this state that have a fair market value of at least one million dollars ($1,000,000), (iii) has more than two hundred fifty (250) employees residing in this state, and (iv) has either (X) more than ten per cent (10%) of its shareholders resident in this state, or (Y) more than ten per cent (10%) of its shares owned of record by state residents. For purposes of this subsection, the number of employees shall be computed by including all employees of subsidiaries or affiliates of the publicly held corporation. For purposes of this subsection, the record date for determining the percentages and number of shareholders and shares shall be the last shareholder record date before the event requiring that the determination be made, except that if a shareholder record date has not been fixed by the board of directors of the issuing public corporation within the preceding four (4) months, the determination shall be made as of the end of the issuing public corporation's most recent fiscal quarter. The residence of a shareholder is presumed to be the address appearing in the records of the issuing public corporation. Shares held of record by banks (except as trustee or guardian), brokers, or nominees shall be disregarded for purposes of calculating percentages and numbers described in this subsection. Shares of an issuing public corporation allocated to the account of an employee or former employee or beneficiaries of employees or former employees of an issuing public corporation held in a plan that is qualified under section 401(a) of the Internal Revenue Code of 1986, as amended, and is a defined contribution plan within the meaning of section 414(i) of the code, shall be deemed for purposes of this subsection, to be held of record by the employee to whose account such shares are allocated.

(13) "Market value," when used in reference to shares or property of any issuing public corporation or any of its subsidiaries, means:

(a) In the case of shares, the highest closing sale price during the thirty (30) day period immediately preceding the date in question of a share of

the composite tape for New York Stock Exchange listed shares or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934, as amended, on which the shares are listed or, if the shares are not listed on any such exchange, on the National Association of Securities Dealers, Inc. Automated Quotations National Market System or, if the shares are not quoted on the National Association of Securities Dealers, Inc. Automated Quotations National Market System, the highest closing bid quotation during the thirty (30) day period preceding the date in question of a share on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use or, if no such quotation is available, the fair market value on the date in question of a share as determined in good faith by the board of the issuing public corporation; and

(b) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined in good faith by the board of the issuing public corporation.

(14) "Publicly held corporation" means a corporation that has a class of equity securities registered pursuant to section 12 or is subject to section 15(d) of the Securities Exchange Act of 1934, as amended.

History.

I.C., § 30-1601, as added by 1988, ch. 84, § 2, p. 147; am. 1989, ch. 139, § 1, p. 320.

STATUTORY NOTES

Federal References.

The Securities Exchange Act of 1934, referred to in paragraphs (4)(b) and (13)(a), is compiled as 15 U.S.C.S. § 78a et seq.

Sections 401(a) and 414(i) of the internal revenue code of 1986, referred to paragraph (12)(b), are codified as 26 U.S.C.S. §§ 401(a) and 414(i), respectively.

Section 12 and 15(d) of the securities exchange act of 1934, referred to in subsection (14), are codified as 78 U.S.C.S. §§ 78*l* and 78o(d), respectively.

Compiler's Notes.

For more on schedule 13D of the securities exchange act of 1934, see *http://www.sec.gov/answers/sched13.htm*.

The national association of securities dealers, inc., referred to in paragraph (13)(a), was combined with certain oversight functions of the New York stock exchange in 2007 to form the financial industry regulatory authority. For more on the financial industry regulatory authority, see *http://www.finra.org/*.

For more on the New York stock exchange, see *https://nyse.nyx.com/*.

The words enclosed in parentheses so appeared in the law as enacted.

30-1602. Duties of director. — In discharging the duties of the position of director of an issuing public corporation, a director, in considering the best interests of the corporation, shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.

History.
I.C., § 30-1602, as added by 1988, ch. 84, § 2, p. 147.

30-1603. Application. — (1) The provisions of this chapter shall not apply to a control share acquisition if:

(a) The acquiring person was an acquiring person on, or became an acquiring person pursuant to a tender offer commenced prior to, the day following the effective date of this act, and remained such;

(b) The original articles or bylaws of the issuing public corporation contain a provision expressly electing not to be subject to this chapter;

(c) The issuing public corporation, by action of its board of directors, adopts an amendment to its bylaws expressly electing not to be subject to this chapter; or

(d) The issuing public corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws approved by the shareholders holding sixty-six and two-thirds per cent (66 2/3%) of the outstanding voting power of all shares entitled to vote, excluding the shares of interested shareholders and their affiliates and associates, under which the issuing public corporation by such shareholder action expressly elects not to be subject to this chapter, and such amendment provides that it is not to be effective until eighteen (18) months after the effective date of this chapter.

(2) The shares of an issuing public corporation acquired by an acquiring person in a control share acquisition that exceed the threshold of voting power of any of the ranges specified in section 30-1604(1)(d), Idaho Code, have only the voting rights accorded them pursuant to section 30-1607, Idaho Code, and then only as provided in such section, and will not otherwise have any voting rights regardless of the terms thereof.

(3) This chapter does not apply to insurance companies regulated under Title 41, Idaho Code.

History.
I.C., § 30-1603, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.
The phrase "the effective date of this chapter" in paragraphs (1)(a) and (1)(d) refers to the effective date of S.L. 1988, ch. 84, which was March 22, 1988.

30-1604. Information statement. — (1) An acquiring person shall deliver to the issuing public corporation at its principal executive office an information statement containing all the following:

(a) The identity of the acquiring person, including the identity of each member of any partnership, limited partnership, syndicate or other group constituting the acquiring person and the identity of each affiliate and associate of the acquiring person, including the identity of each affiliate and associate of each member of such partnership, syndicate or other group;

(b) A reference that the information is made under the provisions of this section;

(c) The number and class or series of shares of the issuing public corporation beneficially owned, directly or indirectly, before the control share acquisition by each of the persons identified pursuant to paragraph (a);

(d) The number and class or series of shares of the issuing public corporation acquired or proposed to be acquired pursuant to the control share acquisition by each of the persons identified pursuant to paragraph (a) and specification of which of the following ranges of voting power in the election of directors that, except for the provisions of this chapter, the acquiring person in good faith believes resulted or would result from consummation of control share acquistion [acquisition]:

1. At least twenty per cent (20%) but less than thirty-three and one-third per cent (33 1/3%);
2. At least thirty-three and one-third per cent (33 1/3%) but less than or equal to fifty per cent (50%); or
3. Over fifty per cent (50%); and

(e) The terms of the control share acquisition or proposed control share acquisition, including the source of moneys or other consideration and the material terms of the financial arrangements for the control share acquisition, plans or proposals of the acquiring person, including plans or proposals under consideration to enter into a business combination or combinations involving the issuing public corporation, to liquidate or dissolve the issuing public corporation, to sell all or a substantial part of its assets or merge or consolidate it or exchange its shares with any other person, to change the location of its principal place of busines [business] or its principal executive office or of a material portion of its business activities, to change materially its management or policies of employment, to change materially its charitable or community contributions or its policies, programs or practices relating thereto, to change materially its relationship with suppliers or customers or the communities in which it operates or to make any other material change in its business, corporate structure, management or personnel and such other objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the control share acquistion [acquisition].

(2) If any material change occurs in the facts set forth in the information statement, including any material increase or decrease in the number of shares of the issuing public corporation acquired or proposed to be acquired by the persons identified pursuant to subsection (1)(a) of this section, the acquiring person shall promptly deliver to the issuing public corporation at its principal executive office an amendment to the information statement containing information relating to such material change. An increase or decrease or proposed increase or decrease equal, in the aggregate for all persons identified pursuant to subsection (1)(a) of this section, to one per cent (1%) or more of the total number of outstanding shares of any class or series of the issuing public corporation is deemed material for purposes of this subsection. An increase or decrease or proposed increase or decrease of

less than this amount may be material, depending on the facts and circumstances.

History.
I.C., § 30-1604, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.
The bracketed words "acquisition" in paragraphs (1)(d) and (1)(e) and "business" in paragraph (1)(e) were inserted by the compiler to correct spellings in the enacting legislation.

30-1605. Meeting of shareholders. — If the acquiring person so requests in writing at the time of delivery of an information statement pursuant to section 30-1604, Idaho Code, and has made, or has made a bona fide written offer to make, a control share acquisition and gives a written undertaking to pay or reimburse the issuing public corporation's expenses of a special meeting, except the expenses of the issuing public corporation in opposing approval of the control share acquisition, within ten (10) days after receipt by the issuing public corporation of the information statement, a special meeting of the shareholders of the issuing public corporation shall be called for the purpose of considering the voting rights to be accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to the control share acquisition. The special meeting shall be held no later than fifty-five (55) days after receipt of the information statement, unless the acquiring person agrees to a later date. If no request for a special meeting is made, consideration of the voting rights to be accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to the control share acquisition shall be presented at the next special or annual meeting of the shareholders, which takes place more than fifty-five (55) days after the receipt of the information statement by the issuing public corporation, unless the matter of the voting rights becomes moot. The notice of the meeting shall be accompanied at a minimum by a copy of the information statement and a copy of any amendment to the information statement previously delivered to the issuing public corporation and a statement disclosing that the board of the issuing public corporation recommends approval of, expresses no opinion and is remaining neutral toward, recommends rejection of or is unable to take a position with respect to according voting rights to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired in the control shares acquisition. The notice of meeting shall be given at least ten (10) days before the meeting.

History.
I.C., § 30-1605, as added by 1988, ch. 84, § 2, p. 147.

30-1606. Financing. — No call of a special meeting of the shareholders of the issuing public corporation is required to be made pursuant to section 30-1605, Idaho Code, and no consideration of the voting rights to be

accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to a control share acquisition shall be presented at any special or annual meeting of the shareholders of the issuing public corporation unless at the time of delivery of the information statement pursuant to section 30-1604, Idaho Code, the acquiring person has entered into and has delivered to the issuing public corporation a copy or copies of a definitive financing agreement or agreements with one (1) or more responsible financial institutions or other entities having the necessary financial capacity for any financing of the control share acquisition not to be provided by moneys of the acquiring person.

History.
I.C., § 30-1606, as added by 1988, ch. 84, § 2, p. 147.

30-1607. Voting rights. — (1) Shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition but only if and to the extent approved by a resolution of shareholders of the issuing public corporation at a special or annual meeting of shareholders pursuant to section 30-1605, Idaho Code.

(2) The resolution of shareholders must be approved by the affirmative vote of the holders of sixty-six and two-thirds per cent (66 2/3%) of the voting power of all shares entitled to vote excluding all interested shares.

(3) A class or series of shares of the issuing public corporation is entitled to vote separately as a class or series if any provision of the control share acquisition would, if contained in a proposed amendment to the articles of the issuing public corporation, entitle the class or series to vote separately as a class or series.

(4) To have the voting rights accorded by approval of a resolution of shareholders, any proposed control share acquisition not consummated before the time of the shareholder approval must be consummated within one hundred eighty (180) days after the shareholders' approval.

(5) Any shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition that do not have voting rights accorded to them by approval of a resolution of shareholders shall regain their voting rights on transfer to a person other than the acquiring person or any affiliate or associate of the acquiring person unless the acquisition of the shares by the other person constitutes a control share acquisition, in which case the voting rights of the shares are subject to the provisions of this chapter.

History.
I.C., § 30-1607, as added by 1988, ch. 84, § 2, p. 147.

30-1608. Rights of action. — (1) An acquiring person, an issuing public corporation and shareholders of an issuing public corporation may sue at law or in equity to enforce the provisions of this chapter.

(2) The issuing public corporation may make application to a court of competent jurisdiction to obtain a declaration of the issuing public corpora-

tion's and other persons' obligations and rights under the act, and the court in any such action may, to the extent it deems appropriate, modify the timing requirements under this act during the time the court is determining the matter, provided, however, that, consistent with the proper adjudication of the matter, courts of this state will determine the matter in the most expeditious manner practicable.

History.
I.C., § 30-1608, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.
The terms "the act" and "this act" in subsection (2) refer to S.L. 1988, ch. 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

30-1609. Redemption. — (1) Unless otherwise expressly provided in the articles or in bylaws of an issuing public corporation, the issuing public corporation may call for redemption of all but not less than all shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition at a redemption price equal to the market value of the shares at the time the call for redemption is given if either:

(a) An information statement has not been delivered to the issuing public corporation by the acquiring person by the tenth day after the control share acquisition; or

(b) An information statement has been delivered but the shareholders have voted not to accord voting rights to such shares pursuant to section 30-1607(2), Idaho Code.

(2) The issuing public corporation shall give the call for redemption within thirty (30) days after the event giving the issuing public corporation the option to call the shares for redemption and the shares shall be redeemed within sixty (60) days after the call is given.

History.
I.C., § 30-1609, as added by 1988, ch. 84, § 2, p. 147.

30-1610. Scope. — (1) Nothing contained in this chapter is intended or shall be construed in any way to limit, modify or restrict an issuing public corporation's authority to take any action which the directors may appropriately determine to be in furtherance of the protection of the interests of the corporation and its shareholders, including without limitation the authority to adopt or enter into plans, arrangements or instruments that deny rights, privileges, power or authority to the holder or holders of at least a specified number of shares or percentage of share ownership or voting power in certain circumstances.

(2) The requirements imposed by this chapter are to be in addition to, and not in lieu of, requirements imposed on a transaction by any provision in the articles or the bylaws of the issuing public corporation, or otherwise.

History.
I.C., § 30-1610, as added by 1988, ch. 84, § 2, p. 147.

30-1611. Jurisdiction. — (1) If the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to this chapter which imposes limitations on the voting rights of any person in the event that the person acquires or proposes to acquire shares of the issuing public corporation which exceed or meet any level or range of ownership or voting powers specified in such law, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent necessary to resolve such inconsistency.

(2) If any jurisdiction other than the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to the provisions of this chapter which imposes limitations on the voting rights of any person in the event that the person acquires or proposes to acquire shares of the issuing public corporation which exceed or meet any level or range of ownership specified in such law and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent that (i) a greater percentage of shareholders of the issuing public corporation reside in that jurisdiction than in this state, computed in accordance with provisions of section 30-1601(12), Idaho Code, and then, only to the extent necessary to resolve such inconsistency or (ii) the director of the department of finance determines within three (3) business days from the date on which this chapter's provisions are first applicable to a particular control share acquisition that the other jurisdiction's law adequately provides for the protection of Idaho shareholders.

History.
I.C., § 30-1611, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Cross References.
Director of department of finance, § 67-2701.

30-1612. Severability. — The provisions of this chapter are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act that can be given effect without the invalid provision or application. The invalidity of any provision of this act shall not affect the remaining provisions of this act.

History.
I.C., § 30-1612, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refersto S.L. 1988, ch. 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

30-1613. Election. — Any publicly held corporation which meets the requirements specified in section 30-1601(12)(b)(i), (ii) and (iii), Idaho Code, may, by action of its board of directors, adopt an amendment to its bylaws electing to be subject to this chapter, provided such corporation has one thousand (1,000) or more shareholders of record in this state, and thereby shall be subject to the provisions of this chapter as an issuing public corporation.

History.
I.C., § 30-1613, as added by 1988, ch. 84, § 2, p. 147.

30-1614. Short title. — This chapter shall be known and may be cited as the "Control Share Acquisition Law."

History.
I.C., § 30-1614, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Effective Dates.
Section 4 of S.L. 1988, ch. 84 declared an emergency. Approved March 22, 1988.

CHAPTER 17

BUSINESS COMBINATION ACT

30-1701. Definitions. — In this chapter the following terms have the meaning specified:

(1) "Affiliate" means a person that directly or indirectly controls, is controlled by or is under common control with a specified person.

(2) "Announcement date," when used in reference to any business combination, means the date of the first public announcement of a definitive proposal for the business combination.

(3) "Associate," when used to indicate a relationship with any person, means:

(a) Any corporation or organization of which the person is an officer, director or partner or is, directly or indirectly, the beneficial owner of ten per cent (10%) or more of any class or series of shares entitled to vote or other equity interests;

(b) Any trust or estate in which the person has a ten per cent (10%) or more beneficial interest or as to which the person serves as trustee or personal representative or in a similar fiduciary capacity; or

(c) Any relative or spouse of the person, or any relative of the spouse, residing in the home of the person.

(4) "Beneficial owner," when used with respect to shares or other securities, includes any person who, directly or indirectly, through any agreement, arrangement, relationship, understanding or otherwise, whether or not in writing, has or shares the power to vote, or direct the voting of, the shares or securities or has or shares the power to dispose of, or direct the disposition of, the shares or securities, except that:

(a) A person is not deemed the beneficial owner of shares or securities tendered pursuant to a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares or securities are accepted for purchase or exchange or payment, or purchased or exchanged; and

(b) A person is not deemed the beneficial owner of shares or securities with respect to which the person has the power to vote or direct the voting arising solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Securities Exchange Act of 1934, as amended, and is not then reportable under that act on a schedule 13D or comparable report under that act.

(5) "Beneficial ownership" includes the right to acquire shares or securities through the exercise of options, warrants or rights, the conversion of convertible securities or otherwise, regardless of whether exercisable only after the passage of time (whether or not less than sixty (60) days) or the occurrence or nonoccurrence of a future event. The shares or securities subject to the options, warrants, rights or conversion privileges held by a person are deemed to be outstanding for the purpose of computing the percentage of outstanding shares or securities of the class or series owned by the person but are not deemed to be outstanding for the purpose of computing the percentage of the class or series owned by any other person. A person is deemed the beneficial owner of shares and securities beneficially owned by an affiliate or associate of the person.

(6) "Business combination," when used in reference to any issuing public corporation and any interested shareholder of the issuing public corporation, means:

(a) Any merger or consolidation of the issuing public corporation or any subsidiary of the issuing public corporation with either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after

the merger would be, an affiliate or associates of the interested shareholder, except that the foregoing does not include the merger of a wholly owned subsidiary of the issuing public corporation into the issuing public corporation or the merger of two (2) or more wholly owned subsidiaries of the issuing public corporation; or

(b) Any exchange, pursuant to a plan of exchange under the laws of this state or a comparable statute of any other state or jurisdiction, of shares of the issuing public corporation or any subsidiary of the issuing public corporation for shares of either:

1. The interested shareholder; or
2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the exchange would be, an affiliate or associate of the interested shareholder; or

(c) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in a single transaction or a series of transactions, to or with the interested shareholder or any affiliate or associate of the interested shareholder, whether as part of a dissolution or otherwise, of assets of the issuing public corporation or any subsidiary of the issuing public corporation to which any of the following applies:

1. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation;
2. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation; or
3. Represents ten per cent (10%) or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation; or

(d) Any transaction which results in the issuance or transfer by the issuing public corporation or any subsidiary of the issuing public corporation, in a single transaction or a series of transactions, of any shares of the issuing public corporation that have an aggregate market value equal to five per cent (5%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation to the interested shareholder or any affiliate or associate of the interested shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered or distributed or a dividend or distribution paid or made pro rata to all shareholders of the issuing public corporation, and except pursuant to the exercise or conversion of securities exercisable for or convertible into shares of the issuing public corporation or any subsidiary of the issuing public corporation which securities were outstanding prior to the time that the interested stockholder became such; or

(e) The adoption of any plan or proposal for the liquidation or dissolution of the issuing public corporation, or any reincorporation of the issuing public corporation in another state or jurisdiction, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder; or

(f) Any transaction involving any reclassification of securities, including any share dividend or split, reverse share split or other distribution of shares in respect of shares, recapitalization of the issuing public corporation, merger or consolidation of the issuing public corporation with any subsidiary of the issuing public corporation, exchange of shares of the issuing public corporation with any subsidiary of the issuing public corporation or other transaction, whether or not with or into or otherwise involving the interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder that has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of shares entitled to vote, or securities that are exchangeable for or convertible into or that carry a right to acquire shares entitled to vote, of the issuing public corporation or any subsidiary of the issuing public corporation that is, directly or indirectly, owned by the interested shareholder of [or] any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(g) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the issuing public corporation, of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through the issuing public corporation or any subsidiary of the issuing public corporation.

(7) "Consummation," with respect to any business combination, means the date of consummation of the business combination or, in the case of a business combination as to which a shareholder vote is taken, the later of:

(a) The business day before the vote; or

(b) Twenty (20) days before the date of consummation of the business combination.

(8) "Control," "controlling," "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. A person's beneficial ownership of ten per cent (10%) or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation. A person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of avoiding the provisions of this chapter, as an agent, bank, broker, nominee, custodian or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

(9) "Day" means a calendar day and shall consist of the time period from 12:01 a.m. through 12:00 midnight, Idaho time.

(10) "Interested shareholder," when used in reference to any issuing public corporation, means any person, other than the issuing public corporation or any subsidiary of the issuing public corporation, that is either:

(a) The beneficial owner, directly or indirectly, of ten per cent (10%) or more of the voting power of the outstanding shares entitled to vote of the issuing public corporation; or

(b) An affiliate or associate of the issuing public corporation.

(11) "Issuing public corporation" means a publicly held corporation which has at least fifty (50) shareholders and which either:

(a) Is incorporated under the laws of this state; or

(b)(i) Has a place of business or its principal executive office located in this state, (ii) owns or controls assets located within this state that have a fair market value of at least one million dollars ($1,000,000), (iii) has more than two hundred fifty (250) employees residing in this state, and (iv) has either (X) more than ten per cent (10%) of its shareholders resident in this state, or (Y) more than ten per cent (10%) of its shares owned of record by state residents. For purposes of this subsection, the number of employees shall be computed by including all employees of subsidiaries or affiliates of the publicly held corporation. For purposes of this subsection, the record date for determining the percentages and number of shareholders and shares shall be the last shareholder record date before the event requiring that the determination be made, except that if a shareholder record date has not been fixed by the board of directors of the issuing public corporation within the preceding four (4) months, the determination shall be made as of the end of the issuing public corporation's most recent fiscal quarter. The residence of a shareholder is presumed to be the address appearing in the records of the issuing public corporation. Shares held of record by banks (except as trustee or guardian), brokers, or nominees shall be disregarded for purposes of calculating percentages and numbers described in this subsection. Shares of an issuing public corporation allocated to the account of an employee or former employee or beneficiaries of employees or former employees of an issuing public corporation held in a plan that is qualified under section 401(a) of the Internal Revenue Code of 1986, as amended, and is a defined contribution plan within the meaning of section 414(i) of the code, shall be deemed for purposes of this subsection, to be held of record by the employee to whose account such shares are allocated.

(12) "Market value," when used in reference to shares or property of any issuing public corporation or any of its subsidiaries, means:

(a) In the case of shares, the highest closing sale price during the thirty (30) day period immediately preceding the date in question of a share of the composite tape for New York Stock Exchange listed shares or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934, as amended, on which the shares are listed or, if the shares are not listed on any such exchange, on the National Association of Securities Dealers, Inc. Automated Quotations National Market System or, if the shares are not quoted on the National Association of Securities Dealers, Inc. Automated Quotations National Market System, the highest closing bid quotation during

the thirty (30) day period preceding the date in question of a share on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use or, if no such quotation is available, the fair market value on the date in question of a share as determined in good faith by the board of the issuing public corporation; and

(b) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined in good faith by the board of the issuing public corporation.

(13) "Publicly held corporation" means a corporation that has a class of equity securities registered pursuant to section 12 or is subject to section 15(d) of the Securities Exchange Act of 1934, as amended.

(14) "Share acquisition date," with respect to any person and any issuing public corporation, means the date that the person first becomes an interested shareholder.

History.

I.C., § 30-1701, as added by 1988, ch. 84, § 3, p. 147; am. 1989, ch. 139, § 2, p. 320.

STATUTORY NOTES

Federal References.

Sections 12 and 15(d) of the securities exchange act of 1934, referred to in subsection (13), are codified as 78 U.S.C.S. §§ 78*l* and 78o(d), respectively.

The Securities Exchange Act of 1934, referred to in paragraphs (4)(b) and (12)(a), is compiled as 15 U.S.C.S. § 78a et seq.

Sections 401(a) and 414(i) of the internal revenue code of 1986, referred to in subsection (11)(b), are codified as 26 U.S.C.S. §§ 401(a) and 414(i), respectively.

Compiler's Notes.

For more on schedule 13D of the securities exchange act of 1934, see *http://www.sec.gov/answers/sched13.htm*.

For more on the New York stock exchange, see *https://nyse.nyx.com/*.

The national association of securities dealers, inc., referred to in paragraph (12)(a), was combined with functions of the New York stock exchange in 2007 to form the financial industry regulatory authority. For more on the financial industry regulatory authority, see *http://www.finra.org/*.

The bracketed insertion in paragraph (6)(f) was added by the compiler to supply the correct term.

The words in parentheses so appeared in the law as enacted.

30-1702. Duties of director. — In discharging the duties of the position of director of an issuing public corporation, a director, in considering the best interests of the corporation, shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.

History.

I.C., § 30-1702, as added by 1988, ch. 84, § 3, p. 147.

30-1703. Exclusions from chapter. — The provisions of this chapter shall not apply to an interested shareholder if:

(1) The interested shareholder was an interested shareholder on, or

became an interested shareholder pursuant to a tender offer commenced prior to, the day following the effective date of this act, and remained such;

(2) The original articles or bylaws of the issuing public corporation contain a provision expressly electing not to be subject to the provisions of this chapter;

(3) The issuing public corporation, by action of its board of directors, adopts an amendment to its bylaws expressly electing not to be subject to the provisions of this chapter; or

(4) The issuing public corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws approved by the shareholders holding sixty-six and two-thirds per cent (66 2/3%) of the outstanding voting power of all shares entitled to vote, excluding the shares of interested shareholders and their affiliates and associates, under which the issuing public corporation by such shareholder action expressly elects not to be subject to this chapter, and such amendment provides that it is not to be effective until eighteen (18) months after the effective date of this chapter.

(5) The provisions of this chapter do not apply to any business combination of an issuing public corporation with an interested shareholder of the issuing public corporation who became an interested shareholder inadvertently, if the interested shareholder both:

(a) As soon as practicable, divests itself of a sufficient amount of the shares entitled to vote of the issuing public corporation so that it no longer is the beneficial owner, directly or indirectly, of ten per cent (10%) or more of the outstanding shares entitled to vote of the issuing public corporation; and

(b) Would not at any time within the three (3) year period preceding the announcement date with respect to the business combination have been an interested shareholder except for the inadvertent acquisition.

(6) This chapter does not apply to insurance companies regulated under title 41, Idaho Code.

History.

I.C., § 30-1703, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" in subsections (1) and (4) refers to the effective date of S.L. 1988, ch. 84, which was March 22, 1988.

30-1704. Business combination with interested shareholder — Approval by directors. — (1) Except as provided in section 30-1703, Idaho Code, and notwithstanding any other provisions to the contrary in this title, an issuing public corporation may not engage in any business combination or vote, consent or otherwise act to authorize a subsidiary of the issuing public corporation to engage in any business combination with respect to, proposed by or on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with, any

interested shareholder of the issuing public corporation or any affiliate or associate of the interested shareholder for a period of three (3) years after the interested shareholder's share acquisition date, unless the business combination or the acquisition of shares made by the interested shareholder on the interested shareholder's share acquisition date is approved by a committee of the board of the issuing public corporation before the interested shareholder's share acquisition date. The committee shall be formed in accordance with subsection (4) of this section.

(2) If a good faith definitive proposal regarding a business combination is made in writing to the board of the issuing public corporation, a committee of the board formed in accordance with subsection (4) of this section shall consider and take action on the proposal and respond in writing within forty-five (45) days after receipt of the proposal by the issuing public corporation, setting forth its decision regarding the proposal.

(3) If a good faith definitive proposal to acquire shares is made in writing to the board of the issuing public corporation, a committee of the board, formed in accordance with subsection (4) of this section, shall consider and take action on the proposal. Unless the committee responds affirmatively in writing within forty-five (45) days after receipt of the proposal by the issuing public corporation, the committee shall be considered to have disapproved the shares acquisition.

(4) When a business combination or acquisition of shares is proposed pursuant to this section, the board shall promptly form a committee, which may be a committee of the entire board of directors, a majority of which shall be disinterested directors. The committee shall take action on the proposal by the affirmative vote of a simple majority of the committee members. Notwithstanding the provisions of section 30-1703, Idaho Code, the committee is not subject to any direction or control by the board with respect to the committee's consideration of or any action concerning a business combination or acquisition of shares pursuant to this section. For purposes of this subsection, a director or person is disinterested if the director or person (a) is not a present or former officer or employee of the issuing public corporation or a majority owned subsidiary of the issuing public corporation, or (b) is not an officer, director, employee, affiliate or associate of an interested shareholder.

History.
I.C., § 30-1704, as added by 1988, ch. 84, § 3, p. 147.

30-1705. Requirements. — Except as provided in sections 30-1703 and 30-1704, Idaho Code, and notwithstanding any other provisions to the contrary in this title, an issuing public corporation may not engage at any time in any business combination or vote, consent or otherwise act to authorize a subsidiary of the issuing public corporation to engage in any business combination with respect to, proposed by or on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with an interested shareholder of the issuing public corporation or any affiliate or associate of the interested shareholder other than a

business combination meeting all the requirements of this chapter, the articles of the issuing public corporation and the requirements specified in any of the following:

(1) A business combination approved by the board of the issuing public corporation before the interested shareholder's share acquisition date, or as to which the acquisition of shares made by the interested shareholder on the interested shareholder's share acquisition date had been approved by the board of the issuing public corporation before the interested shareholder's share acquisition date.

(2) A business combination approved by the affirmative vote of the holders of sixty-six and two-thirds per cent (66 2/3%) of the outstanding shares entitled to vote not beneficially owned by the interested shareholder proposing the business combination or any affiliate or associate of the interested shareholder proposing the business combination at a meeting called for that purpose no earlier than three (3) years after the interested shareholder's share acquisition date.

(3) A business combination, with respect to which the consummation date is no earlier than three (3) years after the interested shareholder's share acquisition date, that meets all the following conditions:

(a) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of the issuing public corporation in the business combination is at least equal to the higher of the following:

1. The highest per share price (including any brokerage commissions, transfer taxes, and soliciting dealers' fees) paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner, directly or indirectly, of five per cent (5%) or more of the outstanding shares entitled to vote of the issuing public corporation, for any common shares of the same class or series acquired by it within the three (3) year period immediately before the announcement date with respect to the business combination or within the three (3) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher, plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of cash dividends paid, and the market value of any dividends paid other than in cash, per common share since the earliest date, up to the amount of the interest; and

2. The market value per common share on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher, plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per common share since that date, up to the amount of the interest.

(b) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the issuing public corporation in the business combination is at least equal to the highest of the following, whether or not the interested shareholder has previously acquired any shares of the class or series:

1. The highest per share price (including any brokerage commisisons [commissions], transfer taxes, and soliciting dealers' fees) paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner, directly or indirectly, of five per cent (5%) or more of the outstanding shares entitled to vote of the issuing public corporation, for any shares of the class or series acquired by it within the three (3) year period immediately before the announcement date with respect to the business combination or within the three (3) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher, plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the class or series since such earliest date, up to the amount of the interest;
2. The highest preferential amount per share to which the holders of shares of the class or series are entitled in the event of any voluntary liquidation, dissolution or winding up of the issuing public corporation, plus the aggregate amount of any unpaid dividends declared or due as to which the holders are entitle [entitled] before payment of dividends on some other class or series of shares unless the aggregate amount of the dividends is included in the preferential amount; and
3. The market value per share of the class or series on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher, plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the class or series since that date, up to the amount of the interest.

(c) The consideration to be received by holders of a particular class or series of outstanding shares, including common shares, of the issuing public corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of shares previously acquired by it and the consideration is distributed promptly.

(d) The holders of all outstanding shares of the issuing public corporation not beneficially owned by the interested shareholder immediately before

the consummation date with respect to the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with paragraphs (a), (b) and (c) of this subsection.

(e) After the interested shareholder's share acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional shares entitled to vote of the issuing public corporation except:

1. As part of the transaction that resulted in the interested shareholder becoming an interested shareholder;
2. By virtue of proportionate share splits, share dividends or other distributions of shares in respect of shares not constituting a business combination;
3. Through a business combination meeting all of the conditions of section 30-1704, Idaho Code, and this subsection; and
4. Through purchase by the interested shareholder at any price that, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirements of paragraphs (a), (b) and (c) of this subsection.

History.
I.C., § 30-1705, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Compiler's Notes.
The bracketed insertions in paragraphs (3)(b)1 and (3)(b)2, were added by the compiler to correct the spelling and form of the terms in the enacting legislation.

The words enclosed in parentheses so appeared in the law as enacted.

30-1706. Scope. — (1) Nothing contained in this chapter is intended or shall be construed in any way to limit, modify or restrict an issuing public corporation's authority to take any action which the directors may appropriately determine to be in furtherance of the protection of the interests of the corporation and its shareholders, including without limitation the authority to adopt or enter into plans, arrangements or instruments that deny rights, privileges, power or authority to the holder or holders of at least a specified number of shares or percentage of share ownership or voting power in certain circumstances.

(2) The requirements imposed by this chapter are to be in addition to, and not in lieu of, requirements imposed on a transaction by any provision in the articles or the bylaws of the issuing public corporation, or otherwise.

History.
I.C., § 30-1706, as added by 1988, ch. 84, § 3, p. 147.

30-1707. Jurisdiction. — (1) If the jurisdiction under the laws of

which the issuing public corporation is organized has adopted or adopts any law comparable to this chapter which imposes special requirements applicable to any business combination, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent necessary to resolve such inconsistency.

(2) If any jurisdiction other than the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to the provisions of this chapter which imposes special requirements applicable to any business combination, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent that (i) a greater percentage of shareholders of the issuing public corporation reside in that jurisdiction than in this state, computed in accordance with provisions of subsection 30-1701(14) and then, only to the extent necessary to resolve such inconsistency or (ii) the director of the department of finance determines within three (3) business days from the date on which this chapter's provisions are first applicable to a business combination that the other jurisdiction's law adequately provides for the protection of Idaho shareholders.

History.

I.C., § 30-1707, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

30-1708. Severability. — The provisions of this chapter are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act that can give effect without the invalid provision or application. The invalidity of any provision of this act shall not affect the remaining provisions of this act.

History.

I.C., § 30-1708, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1988, ch. 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

30-1709. Election. — Any publicly held corporation which meets the requirements specified in section 30-1701(11)(b)(i), (ii) and (iii), Idaho Code, may, by action of its board of directors, adopt an amendment to its bylaws electing to be subject to this chapter, provided such corporation has one thousand (1,000) or more shareholders of record in this state, and thereby shall be subject to the provisions of this chapter as an issuing public corporation.

History.
I.C., § 30-1709, as added by 1988, ch. 84, § 3, p. 147.

30-1710. Short title. — This chapter shall be known and may be cited as the "Business Combination Law."

History.
I.C., § 30-1710, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Effective Dates.
Section 4 of S.L. 1988, ch. 84 declared an emergency. Approved March 22, 1988.

CHAPTER 18

IDAHO ENTITY TRANSACTIONS ACT

IDAHO REPORTER'S COMMENT

PREFATORY NOTE

The intent of the Idaho entity transactions act ("IETA") is to make the law simpler and more flexible. The Act applies to all types of entities, including corporations, partnerships, limited liability companies, not-for-profit organizations, etc., and applies to entity transactions involving same and different-type entities, including all domestic or a combination of domestic and foreign entities. IETA is referred to as "junction box" statute because it facilitates a large variety of inputs and outputs in terms of what entities are involved in the transaction, and what entity is formed.

IETA covers four types of transactions: mergers, interest exchanges, conversions, and domestications. It does not cover asset sales or divisions. Mergers may include consolidations. Interest exchanges may include the common triangular, forward and reverse mergers. Conversions allow any type of entity to become a different type of entity; e.g., LLCs may convert to corporations, corporations may convert to partnerships, etc. Domestications allow entities to change their states of organization. Divisions include split-ups and spin-offs

IETA procedurally facilitates almost any type of entity transaction or combination of entity transactions. Determining whether any such transaction is desirable involves legal, tax and business decisions outside the purview of the Act.

IETA has four substantive articles, each dealing with one type of transaction. Each article has six substantially similar sections. Those sections are as follows:

1. Transaction Authorization;
2. The Transaction Plan;
3. The Approval Process;
4. Amendments and Abandonment of the Plan;
5. Statement of the Transaction to be Filed with the Secretary of State's Office; and
6. The Effect of the Transaction.

There are also special provisions dealing with personal liability issues when a partnership converts to a corporation or vice versa.

All transactions that come within the scope of IETA will be covered exclusively by IETA. That is, conflicting provisions in other entity statutes will no longer apply. Those statutes will not be repealed as they will still be utilized by those few entities (such as banking and insurance entities and public entities) that are specifically excluded from the scope of the Act.

IETA deals with a broad range of transactions which may be subject to Idaho constitutional restrictions. It is important to consider any relevant constitutional provisions when drafting plans for entity restructuring. For example, Section 9, Article XI, Idaho Constitution, deals with issuance of stock and must be considered in any interest exchange. Also, Section 16, Article XI, Idaho Constitution, contains a definition of the term "corporation" that includes many entities not normally considered to be corporations

While the IETA is intended to be comprehensive and define the procedures governing covered transactions, the Idaho drafting committee did not repeal all existing provisions in various current entity statutes. The committee decided to leave those statutes as is for two reasons. First, while few in number, there are some entities which are excluded from the scope of IETA and, accordingly, any relevant transactions entered into by those non-covered entities are still

governed by the existing provisions. Second, voting provisions in the entity statutes continue to apply to those entities covered by IETA and participating in certain IETA transactions.

Part 1. General Provisions

30-18-101. Short title. — This chapter may be known and cited as the "Idaho Entity Transactions Act."

History.
I.C., § 30-18-101, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-18-102. Definitions. — In this chapter:

(1) "Acquired entity" means the entity, all of one (1) or more classes or series of interests in which are acquired in an interest exchange.

(2) "Acquiring entity" means the entity that acquires all of one (1) or more classes or series of interests of the acquired entity in an interest exchange.

(3) "Approve" means, in the case of an entity, for its governors and interest holders to take whatever steps are necessary under its organic rules, organic law, and other law to:

(a) Propose a transaction subject to this chapter;

(b) Adopt and approve the terms and conditions of the transaction; and

(c) Conduct any required proceedings or otherwise obtain any required votes or consents of the governors or interest holders.

(4) "Business corporation" means a corporation whose internal affairs are governed by the Idaho business corporation act, chapter 1, title 30, Idaho Code.

(5) "Conversion" means a transaction authorized by part 4 of this chapter.

(6) "Converted entity" means the converting entity as it continues in existence after a conversion.

(7) "Converting entity" means the domestic entity that approves a plan of conversion pursuant to section 30-18-403, Idaho Code, or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of organization.

(8) "Domestic entity" means an entity whose internal affairs are governed by the law of this state.

(9) "Domesticated entity" means the domesticating entity as it continues in existence after a domestication.

(10) "Domesticating entity" means the domestic entity that approves a plan of domestication pursuant to section 30-18-503, Idaho Code, or the foreign entity that approves a domestication pursuant to the law of its jurisdiction of organization.

(11) "Domestication" means a transaction authorized by part 5 of this chapter.

(12) "Entity" means:
(a) A business corporation;
(b) A nonprofit corporation;
(c) A general partnership, including a limited liability partnership;
(d) A limited partnership, including a limited liability limited partnership;
(e) A limited liability company;
(f) A statutory trust entity;
(g) An unincorporated nonprofit association;
(h) A cooperative;
(i) A limited cooperative association; or
(j) Any other person that has a separate legal existence or has the power to acquire an interest in real property in its own name other than:
(i) An individual;
(ii) A testamentary, inter vivos, or charitable trust, with the exception of a business trust or similar trust;
(iii) An association or relationship that is not a partnership solely by reason of section 53-3-202(c), Idaho Code, or a similar provision of the law of any other jurisdiction;
(iv) A decedent's estate; or
(v) A government, a governmental subdivision, agency, or instrumentality, or a quasi-governmental instrumentality.

(13) "Filing entity" means an entity that is created by the filing of a public organic document.

(14) "Foreign entity" means an entity other than a domestic entity.

(15) "Governance interest" means the right under the organic law or organic rules of an entity, other than as a governor, agent, assignee, or proxy, to:
(a) Receive or demand access to information concerning, or the books and records of, the entity;
(b) Vote for the election of the governors of the entity; or
(c) Receive notice of or vote on any or all issues involving the internal affairs of the entity.

(16) "Governor" means a person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(17) "Interest" means a:
(a) Governance interest in an unincorporated entity;
(b) Transferable interest in an unincorporated entity; or
(c) Share or membership in a corporation.

(18) "Interest exchange" means a transaction authorized by part 3 of this chapter.

(19) "Interest holder" means a direct holder of an interest.

(20) "Interest holder liability" means:
(a) A personal liability for a liability of an entity that is imposed on a person:
(i) Solely by reason of the status of the person as an interest holder; or

(ii) By the organic rules of the entity pursuant to a provision of the organic law authorizing the organic rules to make one (1) or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity; or

(b) An obligation of an interest holder under the organic rules of an entity to contribute to the entity.

(21) "Jurisdiction of organization" of an entity means the jurisdiction whose law includes the organic law of the entity.

(22) "Liability" includes a liability arising in any manner, regardless of whether it is secured or whether it is contingent.

(23) "Merger" means a transaction in which two (2) or more merging entities are combined into a surviving entity pursuant to a filing with the secretary of state.

(24) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(25) "Nonprofit corporation" means a corporation whose internal affairs are governed by the Idaho nonprofit corporation act, chapter 3, title 30, Idaho Code.

(26) "Organic law" means the statutes, if any, other than this chapter, governing the internal affairs of an entity.

(27) "Organic rules" means the public organic document and private organic rules of an entity.

(28) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, business or similar trust, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, unincorporated nonprofit association or any other legal or commercial entity.

(29) "Plan" means a plan of merger, interest exchange, conversion or domestication.

(30) "Private organic rules" means rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all of its interest holders, and are not part of its public organic document, if any.

(31) "Protected agreement" means:

(a) A record evidencing indebtedness and any related agreement in effect on the effective date of this chapter;

(b) An agreement that is binding on an entity on the effective date of this chapter;

(c) The organic rules of an entity in effect on the effective date of this chapter; or

(d) An agreement that is binding on any of the governors or interest holders of an entity on the effective date of this chapter.

(32) "Public organic document" means the public record the filing of which creates an entity, and any amendment to or restatement of that record.

(33) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this state pursuant to a filing with the secretary of state.

(34) "Record" means information that is inscribed on a tangible medium

or that is stored in an electronic or other medium and is retrievable in perceivable form.

(35) "Sign" means, with present intent to authenticate or adopt a record to:

(a) Execute or adopt a tangible symbol; or

(b) Attach to or logically associate with the record an electronic sound, symbol, or process.

(36) "Surviving entity" means the entity that continues in existence after or is created by a merger.

(37) "Transferable interest" means the right under an entity's organic law to receive distributions from the entity.

(38) "Type," with regard to an entity, means a generic form of entity:

(a) Recognized at common law; or

(b) Organized under an organic law, whether or not some entities organized under that organic law are subject to provisions of that law that create different categories of the form of entity.

History.

I.C., § 30-18-102, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 2, p. 73.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in subsection (2), substituted "acquired entity" for "exchanging entity"; added subsection (4) and redesignated the subsequent subsections accordingly; added paragraphs (12)(a) through (12)(i) and paragraph (20)(b) and made related redesignations; in subsection (22), substituted "regardless of whether it is secured or whether it is contingent" for "whether or not it is secured or contingent"; added subsection (25); and rewrote subsection (31), which formerly read: "A debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, issued or signed by an entity which is unpaid, in whole or in part, on the effective date of this chapter."

Compiler's Notes.

The phrase "the effective date of this chapter" refer to the effective date of S.L. 2007, ch. 116, which was July 1, 2007.

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

General — This section defines the terms that will be used in other parts of the act. Many of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concept of separate "transferable" and "governance" interests are inherent in unincorporated entities but have no counterpart in corporations. In addition, because some statutes use different terms to describe the same transaction, the definitions are intended to be broad enough to encompass those similar transactions, regardless of how described. See, for example, "domestication" below.

"Acquired entity" [(1)] — This definition recognizes that an interest exchange may involve only the acquisition of a particular "class" or "series" of interests in an entity. Model Business Corporation Act § 6.01 does not expressly define "classes" or "series." Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member's interest will comprise a separate class or series.

"Acquiring entity" [(2)] — An "acquiring entity" is an entity that acquires the interests of the acquired entity in an interest exchange governed by Article 3 [§ 30-18-301 et seq.].

"Approve" [(3)] — The term "approve" encompasses all of the steps necessary for an entity to propose a transaction, adopt and approve the terms and conditions of the transaction, and obtain the necessary action on the transaction by the governors and interest holders of the entity. The term includes pro-

cedural requirements such as notice to interest holders, preparation of voting lists, etc. The principal laws that will govern approval by an entity of a transaction under this act are the entity's organic law and this act, but regulatory laws may also apply.

"Business corporation" [(4)] — Business corporations and nonprofit corporations are the only specific types of entities referred to in other articles of the act and thus defined terms to facilitate reference to them have been included in this section. Defined terms for other specific types of entities are not needed in the other articles of the act.

"Conversion" [(5)] — The term "conversion" means a transaction authorized by Article 4 [§ 30-18-401 et seq.] pursuant to which an entity of one type is converted into an entity of another type. As used in this act, the term "conversion" does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this act as a "domestication" and is governed by Article 5 [§ 30-18-501 et seq.].

"Converted entity" [(6)] — This term is used in Article 4 [§ 30-18-401 et seq.] to describe the entity that results from a conversion.

"Converting entity" [(7)] — A converting entity is the entity that becomes the converted entity under Article 4 [§ 30-18-401 et seq.]. This definition is patterned in part after Model Business Corporation Act § 9.50(f)(1) ("converting entity").

"Domestic entity" [(8)] — The term "domestic entity" in this act means an entity whose internal affairs are governed by the organic laws of the adopting jurisdiction. Except in the case of general partnerships, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under the Uniform Partnership Act (1997) ("RUPA"), it will mean a general partnership whose governing law under RUPA § 106 is the law of the adopting state. Under RUPA § 106 the governing law is determined by the location of the partnership's chief executive office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed.

"Domesticated entity" [(9)] — This term is used in Article 5 [§ 30-18-501 et seq.] and means the entity that is domesticated pursuant to Article 5. By the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity.

"Domesticating entity" [(10)] — This term is used in Article 5 [§ 30-18-501 et seq.] and means the entity that is domesticated pursuant to Article 5.

"Domestication" [(11)] — The term "domestication" means a transaction of the kind authorized by Article 5 [§ 30-18-501 et seq.] pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of an adopting state will be governed by the laws of both the adopting state and the foreign jurisdiction. Some statutes include what is described in this act as "domestication" in their definition of a "conversion." See, e.g., Colo. Rev. Stat § 7-90-201(2) and (3). It is intended that the domestication provisions of this act will apply to a transaction that may be characterized under another act as a "conversion" if it meets the definition of "domestication" under this act.

"Entity" [(12)] — This definition determines the overall scope of the act because only an "entity" may participate in the transactions authorized by Articles 2, 3, 4, and 5. *See* Sections 201, 301, 401, and 501 [§§ 30-18-201, 30-18-301, 30-18-401, and 30-18-501].

Paragraph (I) [j] is a "catch-all" provision that includes within the definition of "entity" any type of organization authorized under an enacting state's law that is not listed specifically in the preceding paragraphs of this definition. Paragraph (I) [j] is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by subparagraphs (I)(i) through (v) [(j)(i) to (v)]. Thus, this definition is broader than the definition of "business entity" in e.g., Code of Ala. § 10-15-2(2) which does not include nonprofit entities. This definition does not exclude regulated entities such as public utilities, banks and insurance companies. Should a state desire to exclude certain types of regulated entities from participating in transactions permitted by the act for policy reasons, that may be done by listing those types of entities in Section 110(a) [§ 30-18-110], or by permitting those type of entities to engage in transactions under this act generally but prohibiting certain types of transactions by listing those transactions in Section 110(b) [not adopted in Idaho].

Inter vivos and testamentary trusts are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity" (and thus are not within the scope of this act) because of a decision that for public policy reasons they should not be able to engage in transactions under this act. Trusts that carry on a business, however, such as a Massachusetts trust, real estate investment trust, Illinois land trust, or other common law or statutory business trusts are "entities."

Section 4 of the Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an "entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the Uniform Act have nonetheless modified the common law rule, but states that have not adopted the Uniform Act should analyze whether they should modify the definition of "entity" to add an express reference to unincorporated nonprofit associations.

There is some question as to whether a partnership subject to the Uniform Partnership Act (1914) ("UPA") is an entity or merely an aggregation of its partners. That question has been resolved by Section 201 of the Uniform Partnership Act (1997) ("RUPA"), which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of UPA gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an "entity." As a result, all general partnerships will be "entities" regardless of whether the state in which they are organized has adopted RUPA.

Paragraph (H)(i) [(j)(i)] of this definition excludes a sole proprietorship from the concept of an "entity."

Subparagraph (I)(iii) [(j)(iii)] of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not a partnership under RUPA. In that connection, Section 202(c) of RUPA provides in part:

> In determining whether a partnership is formed, the following rules apply:
>
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
>
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships, respectively, that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status. Thus, for example, the election of a general partnership to become a limited liability partnership is not a conversion subject to Article 4 [§ 30-18-401 et seq].

"Filing entity" [(13)] — Whether an entity is a filing entity is determined by reference to whether its legal existence is attributable to the filing of a document with the state filing officer. While the statute refers to an entity that is "created," it is intended to encompass corporations which are "incorporated," limited liability companies which are "organized," and limited partnerships which are "formed" by a filing required by the organic law governing the entity. Business trusts present a special problem. In some states, for example, a business trust is a filing entity, while in other states business trusts are recognized only by common law.

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.,* a statement of qualification under Uniform Partnership Act (1997), § 1001) does not create the entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is created by filing a certificate of limited partnership.

This definition is patterned after Model Business Corporation Act § 1.40(9A) ("filing entity").

"Foreign entity" [(14)] — The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) ("UPA") is a domestic or foreign partnership. A UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the Uniform Partnership Act (1997) ("RUPA") that have not registered as limited liability partnerships will be governed by RUPA § 106(a) ("state where the partnership's chief executive office is located").

"Governance interest" [(15)] — A governance interest is typically only part of the interest that a person will hold in an entity and is usually coupled with a transferable interest (or economic rights). However, memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and in others may not include either governance interests or transferable interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer transferable interests. An interest holder in such an unincorpo-

rated business entity who transfers only a transferable interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a transferable interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Shares in a business corporation that are nonvoting nonetheless have a governance interest because they entitle the holder to certain rights of access to information and to statutory voting rights on certain amendments of the articles of incorporation and certain mergers and share exchanges.

Governors of an entity have the kinds of rights listed in the definition of "governance interest" by reason of their position with the entity. For a governor to have a "governance interest," however, requires that the governor also have those rights for a reason other than the governor's status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

"Governor" [(16)] — This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. *Compare* Colo. § 7-90-102(35.7) which uses the term "manager" to refer to this concept, even though "manager" is also a term of art in connection with limited liability companies. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

Except as described above, the term "governor" includes:

- Director of a business corporation.
- Director or trustee of a nonprofit corporation.
- General partner of a general partnership.
- General partner of a limited partnership.
- Manager of a limited liability company.
- Member of a member-managed limited liability company.
- Trustee of a business trust or statutory trust entity.
- Director of a cooperative.

"Interest" [(17)] — In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in certain nonprofit corporations or unincorporated nonprofit associations generally do not have any transferable interest because they may not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this act. An interest holder in an unincorporated business entity may transfer all or part of the interest holder's transferable interest without the transferee's acquiring the governance interest of the transferor. In that case, whether the transferor will retain the status of an interest holder will be determined by the applicable organic law and the transferee will have the status of an interest holder under paragraph (B) [(b)] of this definition. That paragraph will also apply to subsequent transferees from the original transferee.

The term "interest" includes:

- Beneficial interest in a business trust or statutory trust entity.
- Membership in a nonprofit corporation.
- Membership in an unincorporated nonprofit association.
- Membership interest in a limited liability company.
- Partnership interest in a general partnership.
- Partnership interest in a limited partnership.
- Shares in a business corporation.
- Membership interest in a cooperative.

"Interest exchange" [(18)] — The term "interest exchange" means a transaction authorized by Article 3 [§ 30-18-301 et seq.] pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 301(a) [§ 30-18-301(1)].

"Interest holder" [(19)] — This act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs. *Compare* Code of Ala. § 10-15-2(4) ("equity owner").

The term "interest holder" includes:

- Beneficiary of a business trust or statutory trust entity.
- General partner of a general partnership.
- General partner of a limited partnership.
- Limited partner of a limited partnership.
- Member of a limited liability company.
- Member of a nonprofit corporation.
- Member of an unincorporated nonprofit association.
- Shareholder of a business corporation.
- Member of a cooperative.

This definition has been patterned after Model Business Corporation Act § 1.40(13B) ("interest holder").

"Interest holder liability" [(20)] — This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this act. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to make contributions to the entity or to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder even though creditors of the entity might be able to recover from the interest holder.

This definition is patterned after Model Business Corporation Act § 1.40(15C) ("owner liability"). *See also* Uniform Limited Partnership Act (2001), § 1101(11) ("personal liability").

"Jurisdiction of organization" [(21)] — The term "jurisdiction of organization" refers to the jurisdiction whose laws include the organic law of the entity. The scope of this act is not limited to United States jurisdictions, although for practical purposes that will largely be the case since a transaction that impinges on a foreign country may be conducted under this act only if the laws of the foreign country authorize the transaction. *See* Sections 201(b), 301(b), 401(b), and 501(b) [§ 30-18-201(2), 30-18-301(2), 30-18-401(2), and 30-18-501(2)].

"Liability" [(22)] — The term "liability" is intended to be all-inclusive and includes all obligations of whatever description or kind. It includes anything that would be a liability under generally accepted accounting principles. It also includes contingent liabilities, and in general any obligation owed to another person.

"Merger" [(23)] — The term means a transaction in which two or more entities are combined into a single entity pursuant to a filing with the Secretary of State. The term "merger" in this act includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities.

"Merging entity" [(24)] — The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

"Nonprofit corporation" [(25)] — Nonprofit corporations and business corporations are the only specific types of entities referred to in the act and thus defined terms to facilitate reference to them have been included in this section. Defined terms for other specific types of entities are not needed in the act.

"Organic law" [(26)] — Organic law includes statutes other than this act that govern the internal affairs of an entity. To the extent these other statutes should be applicable to a transaction under this act, their effect is preserved by Section 103 [§ 30-18-103].

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.,* Cal. Gen. Corp. Law § 2115, N.Y. N-PCL §§ 1318-1321, 15 Pa.C.S. § 6145. Such a "sticky fingers" law is included within the definition of "organic law" for purposes of this act.

"Organic rules" [(27)] — The term "organic rules" means an entity's public organic document and the private organic rules. The organic rules, together with this act, the organic law, and the common law provide the rules governing the internal affairs of the entity.

"Person" [(28)] — The term "person" has the standard meaning of that term in uniform acts.

"Plan" [(29)] — The term "plan" refers to the plan of merger, interest exchange, conversion, or domestication, as the case may be, depending on which form of transaction is taking place. *See* Sections 202, 302, 402, and 502 [§§ 30-18-202, 30-18-302, 30-18-402, and 30-18-502].

"Private organic rules" [(30)] — The term private "organic rules" is intended to include all governing rules of an entity that

are binding on all of its interest holders, whether or not in written form, except for the provisions of the entity's public organic document, if any. The term is intended to include agreements in "record" form as well as oral partnership agreements and oral operating agreements among LLC members. Where private organic rules have been amended or restated, the term means the private organic rules as last amended or restated.

The term "private organic rules" includes:

- Bylaws of a business corporation.
- Bylaws of a business trust or statutory trust entity.
- Bylaws of a nonprofit corporation.
- Constitution and bylaws of an unincorporated nonprofit association.
- Operating agreement of a limited liability company.
- Partnership agreement of a general partnership.
- Partnership agreement of a limited partnership.
- Bylaws of a cooperative.

"Protected agreement" [(31)] — The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the act. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the act. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. *See* Sections 301(d), 401(c), and 501(d) [§§ 30-18-301(d), 30-18-401(c), and 30-18-501(d)].

"Public organic document" [(32)] — A "public organic document" is a document that is filed of public record to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under Section 303 of the Uniform Partnership Act (1997) or any of the other statements that may be filed under that act since those statements do not create a new entity. A limited liability partnership is the same entity as the partnership that files the statement. For the same reason, the term also does not include a statement of qualification filed under Section 1001 of that act to become a limited liability partnership. Similarly, the term does not include a statement of authority filed under Section 5 of the Uniform Unincorporated Nonprofit Association Act or a statement appointing an agent filed under Section 10 of that act. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

The term "public organic document" includes:

- Articles of incorporation of a business corporation.
- Articles of incorporation of a nonprofit corporation.
- Certificate of limited partnership.
- Certificate of organization of a limited liability company.
- Articles of organization of a cooperative

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic document. But in those states where a business trust is not created by a public filing, the deed of trust or similar document will be part of the private organic rules of the business trust.

"Qualified foreign entity" [(33)] — The term "qualified foreign entity" refers to an entity that is authorized to transact business in the state pursuant to a public filing.

"Record" [(34)] — The term "record" is taken from the Uniform Electronic Transactions Act. It is intended to apply broadly and include all information so long as the information is retrievable in a "perceivable" form.

"Sign" [(35)] — The term "sign" and its derivations are taken from the Uniform Electronic Transactions Act. In the case of filed documents, it should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g,,* Colorado Rev. Stat. § 7-90-301 *et seq*. In such cases, this act should be modified to delete the references to filings being "signed" and merely refer to being filed (or accepted for filing).

"Surviving entity" [(36)] — The term "surviving entity" refers to either a merging entity that survives the merger or the new entity created by the merger.

"Transferable interest" [(37)] — The term "transferable interest" is taken from Section 102(22) of the Uniform Limited Partnership Act (2001).

"Type" [(38)] — The term "type" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperative corporations are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

IDAHO REPORTER'S COMMENT

Section 30-18-102(12) This section is intended to provide a broad definition of "entities" subject to the Idaho Entity Transaction Act and to exclude from the Act only a narrow list of organizations in order to facilitate the policy that the Act should apply as broadly as possible to facilitate entity restructuring transactions. The Act, however, is not intended to apply to all entities and this subsection defines what entities are not covered by the Act. The Act does not apply, for example, to entities created under Title 15, Idaho Code; *inter vivos* and testamentary trusts; trusts created under Title 68, Idaho Code; or state charitable institutions created under Title 66, Idaho Code.

Section 30-18-102(12)(j)(v) This subsection excludes governmental and quasi-governmental entities, including entities on which a public official is a board member as part of his or her official responsibilities, from the scope of the Act. These entities include, without limitation:

- Idaho Transportation Board (Idaho Code § 21-101),
- Cemetery Associations (Title 27, Idaho Code),
- County Governments (Title 31, Idaho Code),
- Educational Entities (Title 33 (except Chapter 24), Idaho Code),
- Healthcare Entities (Title 39, Idaho Code),
- Municipal Corporations (Title 50, Idaho Code),
- Professional Boards (Title 54, Idaho Code),
- State Government (Title 67, Idaho Code),
- Water Courses and Port Districts (Title 70, Idaho Code), and
- State Insurance Fund (Chapter 9, Title 72, Idaho Code) and the Industrial Special Indemnity Fund (Idaho Code § 72-323 *et seq.*).

This listing is not intended to be exhaustive.

Section 30-18-102(28) The Idaho Constitution, Section 16, Article XI, contains a definition of the term "corporation" which has the effect of making Idaho constitutional restrictions on corporations applicable to many other "entities" under this Act.

While the Model Act generally excludes unincorporated associations from the scope of the Act, the Idaho Act specifically includes unincorporated nonprofit associations organized pursuant to Chapter 7, Title 53, Idaho Code, the "Uniform Unincorporated Nonprofit Association Act," as such associations have statutory power to acquire an interest in real property.

Section 30-18-102(30) Private organic rules may be written, oral or develop through course of dealing. This statute does not change existing substantive law regarding the burden of proof to establish the existence of such agreements.

Section 30-18-102(37) The Model Act defines the term "transferable interest" to mean essentially an economic interest in the entity without governance rights. The term is also used in other uniform statutes. The fact that the IETA uses the term does not imply that transferability of a transferable interest cannot be restricted. See, for example, the Limited Liability Company Act, I.C. § 53-601, et seq., and the Limited Partnership Act, I.C. § 53-201, et seq.

30-18-103. Relationship of chapter to other laws. — (1) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(2) This chapter does not authorize an act prohibited by, and does not affect the application or requirements of, law other than this chapter.

(3) A transaction effected under this chapter may not create or impair any right or obligation on the part of a person under a provision of the law of this state other than this chapter relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating corporation unless:

(a) If the corporation does not survive the transaction, the transaction satisfies any requirements of the provision; or

(b) If the corporation survives the transaction, the plan is approved by a vote of the shareholders or directors that would be sufficient to create or impair the right or obligation by a vote of the shareholders or directors.

History.

I.C., § 30-18-103, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 103(a) [§ 30-18-103(1)]** — Section 103(a) [(1)] is a standard provision in uniform acts and has been included to make clear that unless a particular provision of this act displaces "other law," the principles of law and equity continue to apply, including with respect to the rights of interest holders, creditors, transferees, assignees, or other similar parties. Thus subsection (a) [(1)] preserves case law regarding common law fraud; the rights of creditors following leveraged buyouts, spinoffs, asset purchases, or other similar transactions; creditors rights under other laws; the liability of governors for distributions; and creditor rights arising under the various organic laws of unincorporated entities, including when the right to partner contribution arises and the liability of an unincorporated entity for unlawful distributions during or resulting in insolvency of the entity.

2. **Section 103(b) [§ 30-18-103(2)]** — Subsection (b) [(2)] preserves existing regulatory law in an adopting state in general terms. Adopting states should consider more carefully integrating this act with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities. *See also* Section 104 [§ 30-18-104].

Laws other than this act that will apply to transactions under the act include, for example, the various uniform fraudulent transfer and fraudulent conveyance acts; state insolvency statutes; federal bankruptcy law; and Articles 8 and 9 of the UCC.

3. **Section 103(c) [§ 30-18-103(3)]** — Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly-traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in subsection (c) [(3)] on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use the act to avoid the application of the antitakeover statute.

Subsection (c) [(3)] protects the application of antitakeover statutes from being affected by a transaction under this act by requiring that the transaction be approved in a manner that would be sufficient to approve changing the application of the antitakeover statute. If a transaction is approved in that manner, there is no policy reason to prohibit the application of the antitakeover statute from being varied by a transaction under this act. If the application of an antitakeover statute cannot be varied by action of an entity subject to it, then a transaction under this act will be permissible only if the antitakeover provision continues to apply after the transaction or the transaction itself is permissible under the antitakeover statute.

IDAHO REPORTER'S COMMENT

Section 30-18-103 The Idaho Entity Transactions Act does not insulate restructuring transactions from the application of general law in Idaho. Accordingly, IETA transactions must be subjected to analysis under the general laws of Idaho including, e.g., antitrust law (such as Section 18, Article XI, Idaho Constitution, and the Idaho Competition Act, Idaho Code § 48-101 *et seq.*) and tax provisions, as well as federal law.

Voting requirements are generally governed, first, by the existing organic rules of the entity for approving the particular type of transactions, second, if there are no provisions in the entity's organic rules laws applicable to the particular type of transaction, by the voting requirements, if any, in its organic laws for a merger, and third, if there are no provisions applicable to a merger, by an unanimous vote. For instance, see Section 30-18-303(1)(a).

IETA replaces I.C. § 30-1102, the regular corporate merger section, for corporations governed by IETA. The voting requirements for regular corporate mergers for which there are no organic rules applicable to mergers continue to be set forth in Section 30-1-1104, Idaho Code, which applies to IETA mergers and under Section 30-18-203(1)(a)(i) and similar provisions of

other chapters of IETA, to other instances where approval is to be the same as for a merger. The short form merger, Section 30-1-1105, Idaho Code, is not a transaction covered by IETA and is not replaced by IETA. Therefore, the voting requirements of Section 30-1-1105, Idaho Code, will never apply to an IETA transaction.

The Act does not override specific professional entity statutes or professional ethics in Idaho. To the extent professional entities are involved in any IETA transaction, each entity involved in the transaction will need to comply with applicable professional entity statutes. See, for example, Idaho Code §§ 54-212 and 54-214, which establish requirements for accountants' organizations. Moreover, if a foreign professional entity is involved in a transaction falling within the IETA, the foreign professional entity may be required to follow Idaho professional ethical and procedural rules, such as Section 53-615, Idaho Code, which prescribes organizational structure, pursuant to Section 53-650, Idaho Code.

Existing regulatory law is preserved. It is important to consult other applicable statutes, for example, the Uniform Securities Act, Chapter 14, Title 30, Idaho Code, the Idaho Residential Mortgage Practices Act, Chapter 31, Title 26, Idaho Code, the Idaho Collection Agency Act, Chapter 22, Title 26, Idaho Code, and the Idaho Nonprofit Hospital Sale or Conversion Act, Chapter 15, Title 48, Idaho Code, which proscribe certain activities, impose conditions and/or require certain notices and approvals. Thus, where governmental approval was necessary before the adoption of this Act, such approval is still required for any transactions occurring under this Act.

This section specifically requires that IETA transactions must comply with applicable requirements of Idaho takeover statutes. Takeover statutes include those contained in the Control Share Acquisition Act, Chapter 16, Title 30, Idaho Code, the Business Combination Act, Chapter 17, Title 30, Idaho Code, and the Idaho Competition Act, Chapter 1, Title 48, Idaho Code. Those statutes should be consulted and, to the extent applicable, followed in IETA transactions.

30-18-104. Required notice or approval. — (1) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer before engaging in a merger transaction of a type covered by this chapter shall give the notice or obtain the approval in order to be a party to an interest exchange, conversion or domestication.

(2) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this chapter becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted or devised unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of the attorney general specifying the disposition of the property.

History.

I.C., § 30-18-104, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 3, p. 76.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Amendments.

The 2008 amendment, by ch. 36, in subsection (1), inserted "merger" and substituted "in order to be a party to an interest exchange, conversion or domestication" for "to be a party to a transaction under this chapter"; and in subsection (2), deleted "the entity obtains the prior consent of the attorney general" following "unless" and "section 67-1401-5., Idaho Code, or" following "pursuant to," and substituted the language beginning "the law of this state concerning cy pres" for "the common law as it relates to charitable trust assets, or chapter 12, title 68, Idaho Code, or, with respect to nonprofit hospitals, the entity com-

plies with the provisions of chapter 15, title 48, Idaho Code."

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 104(a) [§ 30-18-104(1)]** — Because at least some of the provisions of this act will be new in most states, it is likely that existing state laws that require regulatory approval of transactions by businesses such as banks, insurance companies, or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this act. The purpose of subsection (a) [(1)] is to ensure that transactions under this act will be subject to the same regulatory approval as mergers. This section is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this act may be effectuated indirectly in many cases under existing law by establishing a wholly-owned subsidiary of the desired type and then merging into it.

The consequence of violating subsection (a) should be the same as in the case of a merger consummated without the required approval.

2. **Section 104(b) [§ 30-18-104(2)]** — This act applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state's laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this act. To prevent the procedures in this act from being used to avoid restrictions on the use of property held by nonprofit entities, subsection (b) [(2)] requires approval of the effect of transactions under this act by the appropriate arm of government having supervision of nonprofit entities.

3. **Application** — An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this act specifying the effects of a transaction. *See* Sections 206, 306, 406, and 506 [§§ 30-18-206, 30-18-306, 30-18-406, and 30-18-506].

4. **Source** — Subsection (a) [(1)] is patterned after Model Business Corporation Act § 9.02. Subsection (b) [(2)] is patterned after 15 Pa.C.S. § 5547(b).

IDAHO REPORTER'S COMMENT

Section 30-18-104(2) [see 2008 amendment] The Idaho Act is more specific than the Model Act in dealing with charitable entities. This section specifies that Idaho Code § 48-1501 *et seq.,* the Idaho "NonProfit Hospital Sale or Conversion Act," (which requires certain non-profit hospitals to provide notice of various transactions and obtain review of those transactions and attorney general approval before any transaction affecting the non-profit hospital's charitable trust property can be implemented), Idaho Code § 67-1401(5), (which grants to the attorney general supervisory and enforcement authority over charitable trust assets), Idaho Code § 68-1201 *et seq.,* (Private Foundations and Charitable Trusts), and the common law as it relates to charitable trust assets in general must be considered before a transaction involving such entities occurs.

30-18-105. Status of filings. — A filing under this chapter signed by a domestic entity becomes part of the public organic document of the entity if the entity's organic law provides that similar filings under that law become part of the public organic document of the entity.

History.
I.C., § 30-18-105, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

Articles of merger and other similar documents filed under the Model Business Corporation Act are made a part of the articles of incorporation of each domestic business corporation that is a party to the merger by Section 1.40(1) of the Model Business Corporation Act. This section provides that filings under this act will similarly become part of the public organic document of a domestic corporation. It should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g,*, Colorado Rev. Stat. § 7-90-301 *et seq.* In such cases, this section should be modified to delete the reference to "signed" and merely refer to being filed (or accepted for filing).

30-18-106. Nonexclusivity. — The fact that a transaction under this chapter produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this chapter.

History.
I.C., § 30-18-106, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section allows a transaction that has the same end result as one of the transactions governed by this act, but that is accomplished in a manner not within the scope of this act, to be exempt from this act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to sale of assets statutory provisions rather than under Article 2 [§ 30-18-201 et seq.] of this act, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

30-18-107. Reference to external facts. — A plan may refer to facts ascertainable outside of the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

History.
I.C., § 30-18-107, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section is based on, but more concise than, Section 1.20(k) of the Model Business Corporation Act.

30-18-108. Alternative means of approval of transactions. — Except as otherwise provided in the organic law or organic rules of a domestic entity, approval of a transaction under this chapter by the unanimous vote or consent of its interest holders satisfies the requirements of this chapter for approval of the transaction.

History.
I.C., § 30-18-108, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section makes it clear that a unanimous vote by the interest holders of an entity constitutes the only approval needed of a transaction under this act. That is consistent with the default rules on approval in Sections 203 [§ 30-18-203] (approval of a merger), 303 [§ 30-18-303] (approval of an interest exchange), 403 [§ 30-18-403] (approval of a conversion), and 503 [§ 30-18-503] (approval of a domestication).

IDAHO REPORTER'S COMMENT

Section 30-18-108 The Idaho Act corresponds with the Model Act in having a requirement for unanimous approval of an IETA transaction as the "default" provision. This provision does allow for less than unanimous consent by interest owners of a domestic entity if so provided in the organic rules or organic laws of the domestic entity.

30-18-109. Appraisal rights. — (1) An interest holder of a domestic merging, acquired, converting or domesticating entity is entitled to appraisal rights in connection with the transaction if the interest holder would have been entitled to appraisal rights under the entity's organic law in connection with a merger in which the interest of the interest holder was changed, converted or exchanged unless:

(a) The organic law permits the organic rules to limit the availability of appraisal rights; and

(b) The organic rules provide such a limit.

(2) An interest holder of a domestic merging, acquired, converting or domesticating entity is entitled to contractual appraisal rights in connection with a transaction under this chapter to the extent provided:

(a) In the entity's organic rules;

(b) In the plan; or

(c) In the case of a business corporation, by action of its governors.

(3) If an interest holder is entitled to contractual appraisal rights under subsection (2) of this section and the entity's organic law does not provide

procedures for the conduct of an appraisal rights proceeding, part 13, chapter 1, title 30, Idaho Code, applies to the extent practicable or as otherwise provided in the entity's organic rules or the plan.

History.
I.C., § 30-18-109, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 4, p. 76.

STATUTORY NOTES

Amendments.
The 2008 amendment, by ch. 36, rewrote the section, which formerly read: "Appraisal rights only for shareholders of a corporation that is a party to a transaction covered by this chapter shall be governed by part 13, chapter 1, title 30, Idaho Code."

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 109(a) [§ 30-18-109(1)]** — If an entity's organic law permits the organic rules to limit the availability of appraisal rights, such a provision of the organic rules will apply to the availability of appraisal rights under this section. This section, however, does not authorize the organic rules to limit the availability of appraisal rights in a transaction under the act if the entity's organic law does not authorize such a provision of the organic rules.

Section 13.02(a)(1)(ii) of the Model Business Corporation Act does not provide for appraisal rights in connection with a merger for shares that remain outstanding after consummation of the merger. Appraisal rights will similarly not be available under Section 109(a) [109(1)] for shares that are not changed or converted in connection with a merger.

2. **Section 109(b) [§ 30-18-109(2)]** — This act permits a plan to set forth the terms and conditions of a transaction. A domestic entity may thus choose to grant optional appraisal rights as part of the terms of a transaction in circumstances where appraisal rights would not be available under this section. Section 109(b) [109(2)] validates the grant of such contractual appraisal rights. *Cf.* 6 Del. Code §§ 15-120 (general partnerships), 17-212 (limited partnerships), and 18-210 (limited liability companies) which validate "contractual appraisal rights"; and Model Business Corporation Act § 13.02 which permits the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available. Legislative authorization in subsection (b) [109(2)] of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement. The procedures to be followed in a contractual appraisal rights proceeding under subsection (b) [109(2)] will be the appraisal rights procedures in the entity's organic law if that law provides such procedures. If the entity's organic law does not provide procedures for conducting an appraisal rights proceeding, subsection (c) [109(3)] makes the appraisal rights procedures in the state's business corporation law applicable unless the entity's organic rules or the plan provide otherwise.

IDAHO REPORTER'S COMMENT

Section 30-18-109 The Idaho Act differs from the Model Act insofar as appraisal rights are concerned. IETA preserves the pre-Act policy regarding appraisal rights with one exception. While appraisal rights for domestic corporate shareholders provided in the Idaho Business Corporations Act Parts 11 and 13 (Chapter 1, Title 30) are retained, appraisal rights are not extended to other persons. Thus, contrary to prior law, members of an LLC merging with a corporation have no appraisal rights, although the shareholders of the corporation do.

30-18-110. Excluded entities and transactions. — The following entities may not participate in a transaction under this chapter:

(1) Any corporation, partnership, cooperative association and entity engaged in the business of banking in the state of Idaho subject to the Idaho banking act, as provided in section 26-101, Idaho Code;

(2) Any entity subject to the Idaho credit union act, chapter 21, title 26, Idaho Code;

(3) Any entity subject to chapters 28, 32, 34 and 48, title 41, Idaho Code;

(4) An "insurer" as defined in section 41-103, Idaho Code;

(5) A business and industrial development corporation (BIDCO) licensed under chapter 27, title 26, Idaho Code; and

(6) Perpetual or endowed care cemetery, as defined in section 27-403, Idaho Code, and subject to the endowment care cemetery act of 1963, chapter 4, title 27, Idaho Code.

History.

I.C., § 30-18-110, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

IDAHO REPORTER'S COMMENT

Section 30-18-110 The Idaho Act specifically excludes certain persons from coverage. These persons are generally those subject to regulation by the department of finance or the department of insurance and/or those charged with a public purpose or involving public interest. The Idaho Act excludes such entities because they are subject to extensive regulatory regimes with their own procedural rules.

While "insurers" as defined in the Insurance Code are excluded from the scope of IETA, other entities which may be subject to regulation by the department of insurance are not, for that reason alone, excluded.

Part 2. Merger

30-18-201. Merger authorized. — (1) Except as otherwise provided in this section, by complying with this part:

(a) One (1) or more domestic entities may merge with one (1) or more domestic or foreign entities resulting in a domestic or foreign surviving entity; and

(b) Two (2) or more foreign entities may merge resulting in a domestic entity.

(2) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may be a party to a merger under this part or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of organization.

History.

I.C., § 30-18-201, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — The merger transaction authorized by this act involves the combination of one or more domestic entities with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic surviving entity. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

2. **Section 201(a) [§ 30-18-201(1)]** — Subsection (a)(1) [(1)(a)] states the general rule that subject to the rules set forth in subsections (c) [not adopted in Idaho] and (d) [not adopted in Idaho] one or more domestic entities may merge with or into a domestic or foreign surviving entity. Subsection (a)(2) [(1)(b)] provides that two or more foreign entities may merge into a domestic surviving entity so long as subsection 201(b) [201(2)] is met.

3. **Section 201(b) [§ 30-18-201(2)]** — Subsection (b) [(2)] states that a foreign entity may be a party to a merger or may be the surviving entity in a merger if the merger is authorized by the laws of the foreign entity's jurisdiction of organization.

4. **Section 201(c) [not adopted in Idaho]** — It is expected that many adopting states will retain provisions on mergers solely between entities of the same type in the organic law governing that type of entity and will add similar provisions to other organic laws. *See* the discussion in Section 3 of the Prefatory Note. On the other hand, there will be some types of entities where it is unlikely that merger provisions will be added to their organic law, for example, unincorporated nonprofit associations. In cases where the organic law provides for a merger involving entities all of the same type, the organic law and not this act applies to the transaction; but this act would apply to any merger involving entities of more than one type. In cases where the applicable organic law does not provide for mergers, this act will serve the important function of authorizing mergers involving entities of that type, as well as cross-type mergers involving entities of that type. Some states have statutes that allow cross-type mergers as well as same-type mergers, in which case the cross-type provisions should be repealed when this act is enacted. *See* Appendix 2 [not adopted in Idaho]

5. **Section 201(d) [not adopted in Idaho]** — Subsection (d) [not adopted in Idaho] is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the act generally is set forth in Section 110 [§ 30-18-110].

6. **Tax Considerations** — This act authorizes a merger for state law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

IDAHO REPORTER'S COMMENT

Section 30-18-201 The Idaho Act, like the Model Act, allows and provides for the merger of all covered entities. The Idaho Act makes clear that merger may result in a surviving entity or a new domestic entity. If an entirely new entity is created, applicable new organizational documents must be filed with the appropriate authorities.

While the Idaho Entity Transaction Act provides the procedural mechanism for mergers, other Idaho law should be consulted for substantive guidance. Idaho Entity Transaction Act transactions may be limited by Idaho constitutional restrictions. For example, Section 14, Article XI, Idaho Constitution, generally deals with consolidation of Idaho corporations with foreign corporations. Section 16, Article XI, Idaho Constitution, defines corporation in terms which include, in addition to corporations, other types of entities such as LLCs. This constitutional provision provides that the consolidated corporation shall not thereby become a foreign corporation and that the courts of Idaho shall retain jurisdiction over the corporate property within Idaho. This provision could conceivably affect the validity of a merger of a domestic entity into a foreign entity or redomestication of an Idaho entity to another jurisdiction — under the IETA. The Idaho drafting committee notes an 1895 federal case, *Rust v. United Waterworks Co.*, 70 F. 129 (8th Cir. 1895), which deals with a provision in the Colorado

Constitution virtually identical to Section 14, Article XI, Idaho Constitution. The Eighth Circuit interpreted the provision simply to mean that the domestic corporation still retains Colorado citizenship and Colorado retains jurisdiction over the property which the domestic corporation had in the state. The court held, however, that the constitutional provision does not affect the validity of the transaction. The Idaho drafting committee also suggests that this Idaho constitutional provision may have been adopted to ensure that Idaho retains personal jurisdiction over interstate corporations, which goal has been accomplished by subsequent United States Supreme Court case law, including *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945).

30-18-202. Plan of merger. — (1) A domestic entity may become a party to a merger under this part by approving a plan of merger. The plan must be in a record and contain:

(a) As to each merging entity, its name, jurisdiction of organization, and type;

(b) If the surviving entity is to be created in the merger, a statement to that effect and its name, jurisdiction of organization, and type;

(c) The manner of converting the interests in each party to the merger into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(d) If the surviving entity exists before the merger, any proposed amendments to its public organic document or to its private organic rules that are, or are proposed to be, in a record;

(e) If the surviving entity is to be created in the merger, its proposed public organic document, if any, and the full text of its private organic rules that are proposed to be in a record;

(f) The other terms and conditions of the merger; and

(g) Any other provision required by the law of a merging entity's jurisdiction of organization or the organic rules of a merging entity.

(2) A plan of merger may contain any other provision not prohibited by law.

History.

I.C., § 30-18-202, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 202(a) [§ 30-18-202(1)]** — The requirements for the plan of merger are set forth in Section 202(a) [202(1)]. They are similar to plan of merger provisions in corporation statutes. *See* Model Business Corporation Act § 11.02(c).

2. **Section 202(a)(1) [§ 30-18-201(1)(a)]** — Section 202(a)(1) [(1)(a)] requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of organization. *See* Comment 3 to Section 205 [§ 30-18-205].

3. **Section 202(a)(3) [§ 30-18-202(1)(c)]** — The language of Section 202(a)(3) [(1)(c)] is similar to Model Business Corporation Act § 11.02(c)(3), Uniform Partnership Act (1997) § 905(b)(5), Uniform Limited Partnership Act (2001) § 1106(b)(3), and Uniform Limited Liability Company Act § 904(b)(5). Although Section 202(a)(3) [(1)(c)] and those other provisions are all phrased in similar language,

what may be done under Section 202(a)(3) [(1)(c)] with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" to be accomplished in a merger involving the unincorporated entity, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal right currently afforded to minority stockholders in merging corporate entities. Any perceived "unfairness" in the "shuffle" would be addressed either (i) under principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger.

4. **Section 202(b) [§ 30-18-202(2)]** — Section 202(b) [(2)] provides the statutory authority for a merging party to include a provision in a plan of merger that is not specifically listed in Section 202(a) [(1)]. One such possibility is contractual appraisal rights as provided in Section 109(b) [§ 30-18-109(2)].

IDAHO REPORTER'S COMMENT

Section 30-18-202(1)(c) While the Model Act commentary to this subsection refers to "fiduciary duties," in Idaho any duties that exist within entities are those specified by the entity statutes themselves or the common law. To the extent the Model Act comment may suggest fiduciary duties otherwise exist, it is not accepted as an accurate comment on Idaho law.

30-18-203. Approval of plan of merger. — (1) A plan of merger is not effective unless it has been approved:

(a) By a domestic merging entity:

(i) In accordance with the requirements, if any, in its organic law and organic rules for approval of:

1. In the case of an entity that is not a business corporation, a merger; or

2. In the case of a business corporation, a merger requiring approval by a vote of the interest holders or the business corporation; or

(ii) If neither its organic law nor organic rules provide for approval of a merger described in subparagraph (i)2. of this paragraph, by all of the interest holders of the entity entitled to vote on or consent to any matter; and

(b) In a record, by each interest holder of a domestic merging entity that will have interest holder liability for liabilities that arise after the merger becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(i) The organic rules of the entity provide in a record for the approval of a merger in which some or all of its interest holders become subject to

interest holder liability by the vote or consent of fewer than all of the interest holders; and

(ii) The interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

(2) A merger involving a foreign merging entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

History.

I.C., § 30-18-203, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 5, p. 76.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, added paragraphs (1)(a)(i)1. and (a)(i)2.; in paragraph (1)(a)(ii), inserted "described in subparagraph (i)2. of this paragraph"; in the introductory paragraph in paragraph (1)(b), added "unless, in the case of an entity that is not a business corporation or nonprofit corporation"; and added paragraphs (1)(b)(i) and (1)(b)(ii).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 203(a)** [§ 30-18-203(1)] — Approval under Section 203 includes whatever actions or procedures by the governors and interest holders of an entity are required by its organic law, as modified by its organic rules, to effectuate the merger. If the organic rules of an entity prescribe a procedure for the proposal, adoption and/or approval of a merger, the term "approval" includes compliance with all of those rules. *See* the definition of "approval" ["approve"] in Section 102 [§ 30-18-102].

If the organic law of an entity is silent with respect to procedures for approval of a merger, the organic rules may be amended to provide those procedures. Otherwise, the default procedure in subsection (a)(1)(B) [(1)(a)(ii)] requires approval by the interest holders entitled to vote on governance matters.

The incorporation into this article of the merger procedures in the organic law of a party to a merger should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders. Statutory provisions on voting by classes or voting groups in a merger will also be applicable.

2. **Section 203(a)(2) [§ 30-18-203(1)(b)]**— Subsection (a)(2) [(1)(b)] is patterned in part after Uniform Limited Partnership Act (2001) § 1110. Subsection (a)(2) [(1)(b)] will be applicable, for example, to shareholders of a corporation that merges into a general partnership that is not a limited liability partnership if the shareholders become general partners of the surviving general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner in the surviving entity; and, in that case, the consent of that shareholder would not be required under subsection (a)(2) [(1)(b)].

The consent of an interest holder required by subsection (a)(2)(B) [(1)(b)(ii)] may be given either by (i) signing or agreeing generally to the terms of organic rules that include the required provision permitting less than unanimous approval of a merger in which interest holders become subject to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.

3. **Section 203(b) [§ 30-18-203(2)]** — Where a foreign entity is a party to a merger under this act, subsection (b) [(2)] defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this act if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

IDAHO REPORTER'S COMMENT

Section 30-18-203. The reader should review the Idaho comments to Section 30-18-103.

30-18-204. Amendment or abandonment of plan of merger — Statement of abandonment. — (1) A plan of merger of a domestic merging entity may be amended:

(a) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(b) By the governors or interest holders of the entity in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(i) The amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(ii) The public organic document or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(iii) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(2) After a plan of merger has been approved by a domestic merging entity and before a statement of merger becomes effective, the plan may be abandoned:

(a) As provided in the plan; or

(b) Unless prohibited by the plan, in the same manner as the plan was approved.

(3) If a plan of merger is abandoned after a statement of merger has been filed with the secretary of state and before the filing becomes effective, a statement of abandonment, signed on behalf of a merging entity, must be filed with the secretary of state before the time the statement of merger becomes effective. The statement of abandonment takes effect upon filing, and the merger is abandoned and does not become effective. The statement of abandonment must contain:

(a) The name of each merging or surviving entity that is a domestic entity or a qualified foreign entity;

(b) The date on which the statement of merger was filed; and

(c) A statement that the merger has been abandoned in accordance with this section.

History.

I.C., § 30-18-204, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* Model Business Corporation Act §§ 11.02(e) and 11.08.

30-18-205. Statement of merger — Effective date. — (1) A statement of merger must be signed on behalf of each merging entity and filed with the secretary of state.

(2) A statement of merger must contain:

(a) The name, jurisdiction of organization, and type of each merging entity that is not the surviving entity;

(b) The name, jurisdiction of organization, and type of the surviving entity;

(c) If the statement of merger is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(d) A statement that the merger was approved by each domestic merging entity, if any, in accordance with this part and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of organization;

(e) If the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic document approved as part of the plan of merger;

(f) If the surviving entity is created by the merger and is a domestic filing entity, its public organic document, as an attachment;

(g) If the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(h) If the surviving entity is a foreign entity that is not a qualified foreign entity, a mailing address to which the secretary of state may send any process served on the secretary of state pursuant to section 30-18-206(5), Idaho Code.

(3) In addition to the requirements of subsection (2) of this section, a statement of merger may contain any other provision not prohibited by law.

(4) If the surviving entity is a domestic entity, its public organic document, if any, must satisfy the requirements of the law of this state, except that it does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic document.

(5) A plan of merger that is signed on behalf of all of the merging entities and meets all of the requirements of subsection (2) of this section may be filed with the secretary of state instead of a statement of merger and upon filing has the same effect. If a plan of merger is filed as provided in this subsection (5), references in this chapter to a statement of merger refer to the plan of merger filed under this subsection (5).

(6) A statement of merger becomes effective upon the date and time of filing or the later date and time specified in the statement of merger.

History.

I.C., § 30-18-205, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 6, p. 77.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2008 amendment, by ch. 36, added paragraph (2)(h).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. The requirements for the statement of merger are similar to articles of merger provisions found in most existing corporate merger statutes. *See* Model Business Corporation Act § 11.06.

2. **Section 205(a) [§ 30-18-205(1)]** — The filing of a statement of merger makes the transaction a matter of public record. A separate public filing under the merger provisions of the organic law of a domestic merging entity is not required. Optional provisions dealing with the filing requirements and filing fee for a statement of merger are set forth in Appendix 1 [§§ 30-18-703 to 30-18-712].

3. **Section 205(b)(1) and (2) [§ 30-18-205(2)(a) and (b)]** — The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to qualify to do business in the adopting state, the foreign qualification statute will likely require that the name of the entity as set forth in the statement of merger be the name adopted for purposes of qualifying to do business.

4. **Section 205(b)(3) [§ 30-18-205(2)(c)]** — *See* Comment 9.

5. **Section 205(b)(4) [§ 30-18-205(2)(d)]** — The statement in subsection (b)(4) [(2)(d)] that the plan of merger was approved by each entity in accordance with this article necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

6. **Section 205(b)(6) [§ 30-18-205(2)(f)]** — The public organic document of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic document of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

7. **Section 205(d) [§ 30-18-205(4)]** — Organic laws typically require an initial filing that creates an entity to be signed by the person serving as the incorporator or other organizer. Subsection (d) [(4)], however, provides that the public organic document of the surviving entity does not need to be signed since it is itself attached to a signed document.

Subsection (d) [(4)] also permits the public organic document of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic document. Pursuant to this provision, for example, the public organic document of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

8. **Section 205(e) [§ 30-18-205(5)]** — A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

9. **Section 205(f) [§ 30-18-205(6)]** — The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified. Section 205(f) [(6)] is subject to the 90-day delayed effective date filing limitation in subsection 205(b)(3) [(2)(c)].

IDAHO REPORTER'S COMMENT

Section 30-18-205(4) Other than the few exceptions specified in this section and Section 203 [§ 30-18-203], the public organic document of an entity must comply with all existing statutory and regulatory requirements. For example, Idaho requires identification of the statutory agent and governors for various entities.

30-18-206. Effect of merger. — (1) When a merger becomes effective:

(a) The surviving entity continues or comes into existence;

(b) Each merging entity that is not the surviving entity ceases to exist;

(c) All property of each merging entity vests in the surviving entity without transfer, conveyance, assignment, reversion, or impairment;

(d) All liabilities of each merging entity are liabilities of the surviving entity;

(e) Except as otherwise provided by law other than this chapter or the plan of merger, all of the rights, privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(f) If the surviving entity exists before the merger:

(i) All of its property continues to be vested in it without reversion or impairment;

(ii) It remains subject to all of its liabilities; and

(iii) All of its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(g) The name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(h) If the surviving entity exists before the merger:

(i) Its public organic document, if any, is amended as provided in the statement of merger and is binding on its interest holders; and

(ii) Its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger and are binding on and enforceable by:

1. Its interest holders; and

2. In the case of a surviving entity that is not a business corporation or a nonprofit corporation, any other person that is a party to an agreement that is part of the surviving entity's private organic rules;

(i) If the surviving entity is created by the merger:

(i) Its public organic document, if any, is effective and is binding on its interest holders; and

(ii) Its private organic rules are effective and are binding on and enforceable by:

1. Its interest holders; and

2. In the case of a surviving entity that is not a business corporation or a nonprofit corporation, any other person that was a party to an agreement that was part of the organic rules of a merging entity if that person has agreed to be a party to an agreement that is part of the surviving entity's private organic rules; and

(j) The interests in each merging entity that are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger and to any appraisal rights they have under section 30-18-109, Idaho Code, and the merging entity's organic law.

(2) Except as otherwise provided in the organic law or organic rules of a merging entity, the merger does not give rise to any rights that an interest holder, governor, or third party would otherwise have upon a dissolution, liquidation, or winding-up of the merging entity.

(3) When a merger becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and that becomes subject to interest holder liability with respect to a domestic entity as a result of a merger has interest holder liability only to the extent provided by the organic law of the entity and only for those liabilities that arise after the merger becomes effective.

(4) When a merger becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic merging entity with respect to which the person had interest holder liability is as follows:

(a) The merger does not discharge any interest holder liability under the organic law of the domestic merging entity to the extent the interest holder liability arose before the merger became effective;

(b) The person does not have interest holder liability under the organic law of the domestic merging entity for any liability that arises after the merger becomes effective;

(c) The organic law of the domestic merging entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (a) of this subsection as if the merger had not occurred and the surviving entity was the domestic merging entity; and

(d) The person has whatever rights of contribution from any other person as are provided by the organic law or organic rules of the domestic merging entity with respect to any interest holder liability preserved under paragraph (a) of this subsection as if the merger had not occurred.

(5) When a merger becomes effective, a foreign entity that is the surviving entity:

(a) May be served with process in this state for the collection and enforcement of any liabilities of a domestic merging entity; and

(b) Appoints the secretary of state as its agent for service of process for collecting or enforcing those liabilities.

(6) When a merger becomes effective, the certificate of authority or other foreign qualification of any foreign merging entity that is not the surviving entity is canceled.

History.

I.C., § 30-18-206, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 7, p. 78.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in paragraph (1)(h)(i), substituted "is binding" for "remains binding"; in paragraph (1)(h)(ii), substituted "and are binding on and enforceable by" for "and remain binding on"; added the paragraph (1)(h)(ii)1. designation and paragraph (1)(h)(ii)2.; in paragraph (1)(i)(i), added "is effective and is binding on its interest holders"; in paragraph (1)(i)(ii), substituted "are binding on and enforceable by: 1. Its interest holders; and" for "are binding upon the interest holders of the surviving entity"; added paragraph (1)(i)(ii)2.; and in paragraph (1)(j), added "and the merging entity's organic law."

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — With the exception of subsections (c) and (d) [(3) and (4)], this section closely tracks existing corporate statutory provisions on the effect of a corporate-to-corporate merger. *See* Model Business Corporation Act § 11.07.

Subsections (c) and (d) [(3) and (4)] set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) [(3)] deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a corporate shareholder who agrees to be the general partner in a general partnership that is the surviving entity in a merger between a corporation and a general partnership that is not a limited liability partnership. Subsection (d) [(4)] deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger is effective. An example would be a general partner in a general partnership that merges into a corporation.

The effects of subsections (c) and (d) [(3) and (4)] will depend to a certain extent on how a contractual liability is worded. For example, a lease that provides that the entire rent is due when the lease is signed, but provides that rent may be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing.

Under Section 203(a)(2) [§ 30-18-203(1)(b)], a merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the obligations or liabilities of any other person or entity unless the interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

See also Comments 6 and 7.

2. **Section 206(a) [§ 30-18-206(1)]** — Subsection (a) [(1)] states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. The surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations, and liabilities of the merging entities. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities prior to the merger. A merger also does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger.

After a merger becomes effective, the law of the surviving entity's jurisdiction of organization governs the surviving entity.

See Sections 103(b) [§ 30-18-103(2)] and 104(b) [§ 30-18-104(2)] which modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

3. **Section 206(a)(7) [§ 30-18-206(1)(g)]** — All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under subsection (a)(7) [(1)(g)], the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect, because whether or not the survivor's name is substituted, the survivor succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

4. **Section 206(a)(8) [§ 30-18-206(1)(h)]** — The private organic rules of an unincorporated entity typically may be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus subsection (a)(8)(B) [(1)(h)(ii)] is limited in scope just to amendments to the private organic rules that are to be in a record, if any.

5. **Section 206(a)(10)** — The bracketed language in this subsection should only be included if the enacting state adopts Section 109.

6. **Section 206(c) [§ 30-18-206(3)]** — Subsection (c) [(3)] sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that arise after the effective date of a merger.

When a liability arises will be determined by other applicable law. The concept of "liabilities ['liability']" is defined very expansively in Section 102 [§ 30-18-102].

7. **Section 206(d) [§ 30-18-206(4)]** — Subsection (d) [(4)] provides four rules with respect to a person who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

8. **Section 206(e) [§ 30-18-206(5)]** — When a merger becomes effective, a foreign entity that is the surviving entity is deemed to appoint the secretary of state as its agent for service of process. The proceedings covered by subsection (e) [(5)] include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.

IDAHO REPORTER'S COMMENT

Section 30-18-206(1)(d) This subsection is in accord with Section 15, Article XI, Idaho Constitution, because the surviving entity after a merger under the IETA, by law, assumes all liabilities of the merging entities.

Part 3. Interest Exchange

30-18-301. Interest exchange authorized. — (1) Except as otherwise provided in this section, by complying with this part:

(a) A domestic entity may acquire all of one (1) or more classes or series of interests of another domestic or foreign entity in exchange for interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing; or

(b) All of one (1) or more classes or series of interests of a domestic entity may be acquired by another domestic or foreign entity in exchange for interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing.

(2) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may be the acquiring or acquired entity in an interest exchange under this part if the interest exchange is authorized by the law of the foreign entity's jurisdiction of organization.

(3) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after the effective date of this chapter.

History.

I.C., § 30-18-301, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Compiler's Notes.

The words "the effective date of this chapter", referred to in subsection (3), mean July 1, 2007, the effective date of S.L. 2007, Chapter 116.

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — An interest exchange is the same type of transaction as the share exchange provided for in Section 11.03 of the Model Business Corporation Act ("MBCA"). The effect of an interest exchange is that: (1) the separate existence of the acquired entity is not affected; and (2) the acquiring entity acquires all of the interests of one or more classes of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. Where there is no existing interest exchange statutory authority, a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary produces the same result. Article 3 allows the interest exchange to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

The "classes or series" referenced in Section 301(a) [(1)] are commonly found in corporation law. *See, e.g.*, MBCA § 6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law. *But see* 6 Del. Code §§ 15-407 (general partnerships), 17-208 (limited partnerships), and 18-215 (limited liability companies).

2. **Section 301(a) [§ 30-18-301(1)]** — The acquiring entity is not required to acquire all of the interests in the exchanging entity. For example, assume that an LLC with three classes of membership interests enters into an interest exchange with another entity. The acquiring entity need only acquire all of the ownership interests of one or more classes of the LLC membership interests.

3. **Section 301(b) [§ 30-18-301(2)]** — Subsection (b) [(2)] allows a foreign entity to effectuate an interest exchange with a domestic entity if the interest exchange is authorized by the organic law of the foreign entity.

4. **Section 301(c) [§ 30-18-301(3)]** — This subsection deals with rights of parties to protected agreements (defined in Section 102(31) [§ 30-18-102(31)]) when an interest exchange takes place. Because the concept of an interest exchange is relatively new, a person contracting with an entity or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this article should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Subsection (c) [(3)] accordingly provides a transitional rule that is intended to protect such special rights as to third parties. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the exchanging entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have had if the entity were to participate in a merger without the required consent.

The transitional rule in subsection (c) [(3)] ceases to make sense at such time as the provisions of the agreement giving rise to the special rights is first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provisions giving rise to the special rights is amended.

5. **Section 301(d) [not adopted in Idaho]** — The statutes that should be listed in Section 301(c) [§ 30-18-301(3)] are interest exchange statutes that already exist or are added to the state's various entity statutes when META is adopted. *See also*, the Legislative Note above.

6. **Section 301(e) [not adopted in Idaho]** — Subsection (e) is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the act generally is set forth in Section 110 [§ 30-18-110].

30-18-302. Plan of interest exchange. — (1) A domestic entity may

be the acquired entity in an interest exchange under this part by approving a plan of interest exchange. The plan must be in a record and contain:

(a) The name and type of the acquired entity;

(b) The name, jurisdiction of organization, and type of the acquiring entity;

(c) The manner of converting the interests in the acquired entity into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(d) Any proposed amendments to the public organic document or private organic rules that are, or are proposed to be, in a record of the acquired entity;

(e) The other terms and conditions of the interest exchange; and

(f) Any other provision required by the law of this state or the organic rules of the acquired entity.

(2) A plan of interest exchange may contain any other provision not prohibited by law.

History.

I.C., § 30-18-302, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **General** — This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 303 [§ 30-18-303]. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 202 [§ 30-18-202]. Subsection (a) [(1)] lists the mandatory provisions that must be in the plan. Subsection (b) [(2)] authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 302(a)(3) [§ 30-18-302(1)(c)]** — Under this subsection, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests or securities, cash, or other property. *See also* Comment 3 to Section 202 [§ 30-18-202].

3. **Filing the Plan of Interest Exchange** — The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange (Section 305 [§ 30-18-305]) so long as it contains all the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 305(d) [§ 30-18-305(4)].

30-18-303. Approval of plan of interest exchange. — (1) A plan of interest exchange is not effective unless it has been approved:

(a) By a domestic acquired entity:

(i) In accordance with the requirements, if any, in its organic law and organic rules for approval of an interest exchange;

(ii) Except as otherwise provided in subsection (4) of this section, if neither its organic law nor organic rules provide for approval of an interest exchange, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

1. In the case of an entity that is not a business corporation, a merger, as if the interest exchange were a merger; or
2. In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the interest exchange were that type of merger; or

(iii) If neither its organic law nor organic rules provide for approval of an interest exchange or a merger described in subparagraph (ii)2. of this paragraph, by all of the interest holders of the entity entitled to vote on or consent to any matter; and

(b) In a record, by each interest holder of a domestic acquired entity that will have interest holder liability for liabilities that arise after the interest exchange becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(i) The organic rules of the entity provide in a record for the approval of an interest exchange or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all of the interest holders; and

(ii) The interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

(2) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

(3) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

(4) A provision of the organic law of a domestic acquired entity that would permit a merger between the acquired entity and the acquiring entity to be approved without the vote or consent of the interest holders of the acquired entity because of the percentage of interests in the acquired entity held by the acquiring entity does not apply to approval of an interest exchange under subsection (1)(a)(ii) of this section.

History.

I.C., § 30-18-303, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 8, p. 80.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in paragraph (1)(a)(i), inserted "organic law and"; added paragraphs (1)(a)(ii)1. and (a)(ii)2.; in paragraph (1)(a)(iii), inserted "described in subparagraph (ii)2. of this paragraph"; in the introductory paragraph in paragraph (1)(b), added "unless, in the case of an entity that is not a business corporation or nonprofit corporation"; and added paragraphs (1)(b)(i) and (1)(b)(ii).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — This section sets forth the required approval (defined in Section 102(3)) [§ 30-18-102(3)] of an interest exchange. An interest exchange transaction governed by

this article only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide (*see* subsection (c) [(3)]), a condition that rarely exists.

If the acquired entity is a domestic entity, one of three possibilities will be applicable:

(1) if the organic law (*see* Section 102(26) [§ 30-18-102(26)]) governing the acquired domestic entity has specific provisions for approval of an interest exchange, or even if there are no such provisions, the organic rules (*see* Section 102(27) [§ 30-18-102(27)) of the acquired entity have specific provisions for approval of an interest exchange, then the approval provisions in the organic law or organic rules apply;

(2) if there are no specific provisions for approval of an interest exchange in the acquired entity's organic law or organic rules but either the organic law governing the acquired entity or the acquired entity's organic rules contain provisions for approval of mergers, then those merger provisions (except for any short form merger provisions that allow approval of a merger by the acquired entity without a vote of its interest holders — *see* subsection (d) [(4)]) apply; and

(3) if neither (1) or (2) are applicable, then unanimous consent of the acquired entity's interest holders will be required.

A three-tiered approval scheme is necessary because specific provisions for interest exchanges do not exist in many state corporate and unincorporated entity statutes or in the various types of entity organic rules. *See* Comment 4 to Section 301 [§ 30-18-301].

If the acquired entity is a foreign entity, then approval is in accordance with the laws of the acquired entity's jurisdiction of organization. *See* subsection (b) [2)]. *See also* Comment 3 to Section 203 [§ 30-18-203].

2. **Section 303(a)(2) [§ 30-18-303(1)(b)]** — *See* Comment 2 to Section 203 [§ 30-18-203] for an explanation of this interest holder liability provision.

3. **Section 303(d) [§ 30-18-303(4)]** — Section 303(d) [303(4)] is an exception to the general approach followed in this section of looking to the underlying rules on approval of mergers. Many business corporation laws permit a corporation that owns a specified percentage of the shares of another corporation (typically 80 or 90%) to merge with the subsidiary corporation without a vote of the subsidiary's shareholders. Section 303(d) [303(4)] makes clear that those "short form" merger rules do not apply and a vote of the interest holders of a subsidiary is always required to approve an interest exchange under Article 3 [Part 3]. A provision similar to Section 303(d) [303(4)] has not been included in Article 4 or 5 [Parts 4 or 5] because the conversion and domestication transactions under those chapters only involve a single entity rather than two entities as in the case of a short form merger.

IDAHO REPORTER'S COMMENT

Section 30-18-303 The reader should review the Idaho comment to Section 30-18-103.

30-18-304. Amendment or abandonment of plan of interest exchange — Statement of abandonment. — (1) A plan of interest exchange of a domestic acquired entity may be amended:

(a) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(b) By the governors or interest holders of the entity in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent to any amendment of the plan that will change:

(i) The amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing, to be received by any of the interest holders of the acquired entity under the plan;

(ii) The public organic document or private organic rules of the acquired entity that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the interest holders of the acquired entity under its organic law or organic rules; or

(iii) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(2) After a plan of interest exchange has been approved by a domestic acquired entity and before a statement of interest exchange becomes effective, the plan may be abandoned:

(a) As provided in the plan; or

(b) Unless prohibited by the plan, in the same manner as the plan was approved.

(3) If a plan of interest exchange is abandoned after a statement of interest exchange has been filed with the secretary of state and before the filing becomes effective, a statement of abandonment, signed on behalf of the acquired entity, must be filed with the secretary of state before the time the statement of interest exchange becomes effective. The statement of abandonment takes effect upon filing, and the interest exchange is abandoned and does not become effective. The statement of abandonment must contain:

(a) The name of the acquired entity;

(b) The date on which the statement of interest exchange was filed; and

(c) A statement that the interest exchange has been abandoned in accordance with this section.

History.
I.C., § 30-18-304, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section parallels analogous provisions in Articles [Parts] 2 (mergers), 4 (conversions), and 5 (domestications).

30-18-305. Statement of interest exchange — Effective date. — (1) A statement of interest exchange must be signed on behalf of a domestic acquired entity and filed with the secretary of state.

(2) A statement of interest exchange must contain:

(a) The name and type of the acquired entity;

(b) The name, jurisdiction of organization, and type of the acquiring entity;

(c) If the statement of interest exchange is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(d) A statement that the plan of interest exchange was approved by the acquired entity in accordance with this part; and

(e) Any amendments to the acquired entity's public organic document approved as part of the plan of interest exchange.

(3) In addition to the requirements of subsection (2) of this section, a statement of interest exchange may contain any other provision not prohibited by law.

(4) A plan of interest exchange that is signed on behalf of a domestic acquired entity and meets all of the requirements of subsection (2) of this section may be filed with the secretary of state instead of a statement of interest exchange and upon filing has the same effect. If the plan of interest exchange is filed as provided in this subsection (4), references in this chapter to a statement of interest exchange refer to the plan of interest exchange filed under this subsection (4).

(5) A statement of interest exchange becomes effective upon the date and time of filing or the later date and time specified in the statement of interest exchange.

History.
I.C., § 30-18-305, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — The filing of a statement of interest exchange makes the transaction a matter of public record. A separate public filing under the organic law of the exchanging entity is not required. The mandatory requirements for a statement of interest exchange are set forth in subsection (b) [(2)]. They are essentially the same as the requirements for a statement of merger in Section 205 [§ 30-18-205].

2. **Section 305(b)(3) and (e) [§ 30-18-305(2)(c) and (d)]** — The effective date and time of a statement of interest exchange are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 305(b)(3) [(2)(c)].

3. **Section 305(d) [§ 30-18-305(4)]** — A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in subsection (d) [(4)].

IDAHO REPORTER'S COMMENT

Section 30-18-305(4) Other than the few exceptions specified in this section and Section 303 [§ 30-18-303], the public organic document of an entity must comply with all existing statutory and regulatory requirements. For example, Idaho requires identification of the statutory agent and governors for various entities.

30-18-306. Effect of interest exchange. — (1) When an interest exchange becomes effective:

(a) The interests in the acquired entity that are the subject of the interest exchange cease to exist or are converted or exchanged, and the interest holders of those interests are entitled only to the rights provided to them under the plan of interest exchange and to any appraisal rights they have under section 30-18-109, Idaho Code, and the acquired entity's organic law;

(b) The acquiring entity becomes the interest holder of the interests in the acquired entity stated in the plan of interest exchange to be acquired by the acquiring entity;

(c) The public organic document, if any, of the acquired entity is amended as provided in the statement of interest exchange and is binding on its interest holders; and

(d) The private organic rules of the acquired entity that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange and are binding on and enforceable by:

(i) Its interest holders; and

(ii) In the case of an acquired entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the acquired entity's private organic rules.

(2) Except as otherwise provided in the organic law or organic rules of the acquired entity, the interest exchange does not give rise to any rights that an interest holder, governor, or third party would otherwise have upon a dissolution, liquidation, or winding-up of the acquired entity.

(3) When an interest exchange becomes effective, a person that did not have interest holder liability with respect to the acquired entity and that becomes subject to interest holder liability with respect to a domestic entity as a result of the interest exchange has interest holder liability only to the extent provided by the organic law of the entity and only for those liabilities that arise after the interest exchange becomes effective.

(4) When an interest exchange becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic acquired entity with respect to which the person had interest holder liability is as follows:

(a) The interest exchange does not discharge any interest holder liability under the organic law of the domestic acquired entity to the extent the interest holder liability arose before the interest exchange became effective;

(b) The person does not have interest holder liability under the organic law of the domestic acquired entity for any liability that arises after the interest exchange becomes effective;

(c) The organic law of the domestic acquired entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (a) of this subsection as if the interest exchange had not occurred; and

(d) The person has whatever rights of contribution from any other person as are provided by the organic law or organic rules of the domestic acquired entity with respect to any interest holder liability preserved under paragraph (a) of this subsection as if the interest exchange had not occurred.

History.

I.C., § 30-18-306, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 9, p. 81.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in paragraph (1)(a), added "and the acquired entity's organic law"; in paragraph (1)(c), substituted "is binding" for "remains binding"; in paragraph (1)(d), substituted "and are binding on and enforceable by" for "and remain binding on"; and added the paragraph (1)(d)(i) designation and the text of paragraph (1)(d)(ii).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 306(a) [§ 30-18-306(1)]** — In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, subsection (a) [(1)] is significantly simpler than Section 206(a) [§ 30-18-206(1)] with respect to the effects of a merger.

When an interest exchange becomes effective: (1) the interests of the acquired entity are exchanged, converted or canceled as provided in the plan; (2) the only rights of the former interest holders of the acquired entity whose interests are affected by the interest exchange are those rights related to the exchange, conversion or cancellation; (3) the acquiring entity becomes the owner of the acquired entity's interests as provided in the plan; and (4) the organic rules of the acquired entity are amended as provided in the statement of interest exchange, thus obviating the need for repetitive filings (i.e., a filing as to the entity interest exchange and another filing to reflect amendments to public organic documents as required by the laws governing the acquired entity).

2. **Section 306(c) [§ 30-18-306(3)]** — Subsection (c) [(3)] provides the rule for future interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 4 (conversions), and 5 (domestications). *See* Comment 6 to Section 206 [§ 30-18-206].

3. **Section 306(d) [§ 30-18-306(4)]** — Subsection (d) [(4)] provides the rule for past interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 4 (conversions), and 5 (domestications). *See* Comment 7 to Section 206 [§ 30-18-206].

PART 4. CONVERSION

30-18-401. Conversion authorized. — (1) Except as otherwise provided in this section, by complying with this part, a domestic entity may become:

(a) A domestic entity of a different type; or

(b) A foreign entity of a different type, if the conversion is authorized by the law of the foreign jurisdiction.

(2) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may become a domestic entity of a different type if the conversion is authorized by the law of the foreign entity's jurisdiction of organization.

(3) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a conversion, the provision applies to a conversion of the entity as if the conversion were a merger until the provision is amended after the effective date of this chapter.

History.

I.C., § 30-18-401, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" in subsection (13) refers to the effective date of S.L. 2007, ch. 116, which was July 1, 2007.

OFFICIAL COMMENT

1. **In General** — The procedure in this article permits an entity to change to a different type of entity. A transaction in which an entity changes its jurisdiction of organization but does not change its type is a domestication transaction and is the subject of Article [Part] 5.

2. **Conversion of a Foreign Entity into a Domestic Entity** — Subsection (b) [(2)] allows a foreign entity to effectuate a conversion into a domestic entity only if the conversion is permitted by the laws of the foreign entity's jurisdiction of organization. *See* Section 102(21) [§ 30-18-102(21)] for the definition of "jurisdiction of organization." When a foreign entity becomes a domestic entity pursuant to this article, the effect of the conversion will be as provided in Section 406 [§ 30-18-406]. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's jurisdiction of organization.

3. **Conversion of a Domestic Entity into a Foreign Entity** — Under subsection (a)(2) [(1)(b)] this type of conversion must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Article [Part] 2.

4. **Section 401(c) [§ 30-18-401(3)]** — *See* Comment 4 to Section 301 [§ 30-18-301].

5. **Section 401(d) [§ 30-18-401(4)]** — Subsection (d) [(4)] is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the act generally is set forth in Section 110 [§ 30-18-110].

30-18-402. Plan of conversion. — (1) A domestic entity may convert to a different type of entity under this part by approving a plan of conversion. The plan must be in a record and contain:

(a) The name and type of the converting entity;

(b) The name, jurisdiction of organization, and type of the converted entity;

(c) The manner of converting the interests in the converting entity into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(d) The proposed public organic document of the converted entity if it will be a filing entity;

(e) The full text of the private organic rules of the converted entity that are proposed to be in a record;

(f) The other terms and conditions of the conversion; and

(g) Any other provision required by the law of this state or the organic rules of the converting entity.

(2) A plan of conversion may contain any other provision not prohibited by law.

History.

I.C., § 30-18-402, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 403 [§ 30-18-403]. The content of a plan of conversion is similar to the content of a plan of merger. *See* Section 202 [§ 30-18-202]. Subsection (a) [(1)] lists the mandatory provisions that must be in the plan. Subsection (b) [(2)] authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 402(a)(3) [§ 30-18-402(1)(c)]** — Interest holders in the converting entity may receive interests or other securities of the converted entity or of any other person, obligations, rights to acquire interests or other securities, cash, or other property. *See also* Sections 202(a)(3) [§ 30-18-202(1)(c)], 302(a)(3) [§ 30-18-302(1)(c)] (interest exchange), and 503(a)(3) [§ 30-18-503(1)(c)] (domestication).

3. **Filing the Plan of Conversion** — The plan of conversion may, but need not, be filed instead of the statement of conversion (Section 405 [§ 30-18-405]), so long as it contains all of the information required to be in the statement of conversion and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 405(e) [§ 30-18-405(5)].

30-18-403. Approval of plan of conversion. — (1) A plan of conversion is not effective unless it has been approved:

(a) By a domestic converting entity:

(i) In accordance with the requirements, if any, in its organic rules for approval of a conversion;

(ii) If its organic rules do not provide for approval of a conversion, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

1. In the case of an entity that is not a business corporation, a merger, as if the conversion were a merger; or

2. In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the conversion were that type of a merger; or

(iii) If neither its organic law nor organic rules provide for approval of a conversion or a merger described in subparagraph (ii)2. of this paragraph, by all of the interest holders of the entity entitled to vote on or consent to any matter; and

(b) In a record, by each interest holder of a domestic converting entity that will have interest holder liability for liabilities that arise after the conversion becomes effective, unless, in the case of an entity that is not a business or nonprofit corporation:

(i) The organic rules of the entity provide in a record for the approval of a conversion or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all of the interest holders; and

(ii) The interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

(2) A conversion of a foreign converting entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

History.

I.C., § 30-18-403, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 10, p. 82.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, added paragraphs (1)(a)(ii)1. and (a)(ii)2.; in paragraph (1)(a)(iii), inserted "described in subparagraph (ii)2. of this paragraph"; in the introductory paragraph in paragraph (1)(b), added "unless, in the case of an entity that is not a business or nonprofit corporation"; and added paragraphs (1)(b)(i) and (1)(b)(ii).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — As is the case with the other types of transactions authorized by this act, there are three possible ways to obtain approval (defined in Section 102(3) [§ 30-18-102(3)]) of a conversion by a domestic entity. The first is to determine if the organic rules (defined in Section 102(27) [§ 30-18-102(27)]) of the converting entity contain specific approval provisions for conversions. If they exist, then those provisions apply to approval of the plan of conversion. *See* Section 403(a)(1)(A) [§ 30-18-403(1)(a)(i)]. If there are no provisions in the organic rules for approval of a conversion, then the provisions for approval of a merger in either the organic law (defined in Section 102(26) [§ 30-18-102(26)]) or organic rules of the entity will apply. Section 403(a)(1)(B) [§ 30-18-403(1)(a)(ii)]. If there are no approval provisions for conversions in the entity's organic rules and no approval provisions for mergers in the entity's organic law or organic rules, then unanimous consent of all the entity's interests holders is required. Section 403(a)(1)(C) [§ 30-18-403(1)(a)(iii)].

In the case of a foreign entity that is converting into another type of entity in this jurisdiction, the required approval is determined by the laws of the foreign entity's jurisdiction of organization. Section 403(b) [§ 30-18-403(2)].

If approval of a conversion occurs under subsection (a)(1)(B) [(1)(a)(ii)], the approval provisions for mergers that will apply will not include provisions on "short-form" mergers. A short-form merger involves a merger between a subsidiary and a parent that controls a large majority of the interests in the subsidiary (typically at least 80 or 90%). In those cases, the parent is permitted to merge with the subsidiary without the need for the governors or interest holders of the subsidiary to approve the merger. Because a conversion is a single-party transaction, short-form merger procedures are inapposite and it was not considered necessary to confirm that expressly in the statutory text (unlike in the case of interest exchanges, which are two-party transactions — *see* Section 303(d) [§ 30-18-303(4)]).

2. **Section 403(a)(2) [§ 30-18-403(1)(b)]** — *See* Comment 2 to Section 203 [§ 30-18-203] for an explanation of this interest holder liability provision.

IDAHO REPORTER'S COMMENT

Section 30-18-403 The reader should review the Idaho comment to Section 30-18-103.

30-18-404. Amendment or abandonment of plan of conversion — Statement of abandonment. — (1) A plan of conversion of a domestic converting entity may be amended:

(a) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(b) By the governors or interest holders of the entity in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to any amendment of the plan that will change:

(i) The amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combina-

tion of the foregoing, to be received by any of the interest holders of the converting entity under the plan;

(ii) The public organic document or private organic rules of the converted entity that will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(iii) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(2) After a plan of conversion has been approved by a domestic converting entity and before a statement of conversion becomes effective, the plan may be abandoned:

(a) As provided in the plan; or

(b) Unless prohibited by the plan, in the same manner as the plan was approved.

(3) If a plan of conversion is abandoned after a statement of conversion has been filed with the secretary of state and before the filing becomes effective, a statement of abandonment, signed on behalf of the entity, must be filed with the secretary of state before the time the statement of conversion becomes effective. The statement of abandonment takes effect upon filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(a) The name of the converting entity;

(b) The date on which the statement of conversion was filed; and

(c) A statement that the conversion has been abandoned in accordance with this section.

History.
I.C., § 30-18-404, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section parallels analogous provisions in Articles 2 [Parts] (mergers), 3 (interest exchanges), and 5 (domestications).

30-18-405. Statement of conversion — Effective date. — (1) A statement of conversion must be signed on behalf of the converting entity and filed with the secretary of state.

(2) A statement of conversion must contain:

(a) The name, jurisdiction of organization, and type of the converting entity;

(b) The name, jurisdiction of organization, and type of the converted entity;

(c) If the statement of conversion is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(d) If the converting entity is a domestic entity, a statement that the plan of conversion was approved in accordance with this part or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign converting entity in accordance with the law of its jurisdiction of organization;

(e) If the converted entity is a domestic filing entity, the text of its public organic document, as an attachment;

(f) If the converted entity is a domestic limited liability partnership, the text of its statement of qualification, as an attachment; and

(g) If the converted entity is a foreign entity that is not a qualified foreign entity, a mailing address to which the secretary of state may send any process served on the secretary of state pursuant to section 30-18-406(5), Idaho Code.

(3) In addition to the requirements of subsection (2) of this section, a statement of conversion may contain any other provision not prohibited by law.

(4) If the converted entity is a domestic entity, its public organic document, if any, must satisfy the requirements of the law of this state, except that it does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic document.

(5) A plan of conversion that is signed on behalf of a domestic converting entity and meets all of the requirements of subsection (2) of this section may be filed with the secretary of state instead of a statement of conversion and upon filing has the same effect. If a plan of conversion is filed as provided in this subsection (5), references in this chapter to a statement of conversion refer to the plan of conversion filed under this subsection (5).

(6) A statement of conversion becomes effective upon the date and time of filing or the later date and time specified in the statement of conversion.

History.

I.C., § 30-18-405, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 11, p. 83.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2008 amendment, by ch. 36, added paragraph (2)(g).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — The filing of a statement of conversion makes the transaction a matter of public record. The mandatory requirements for a statement of conversion are set forth in

subsection (b) [(2)]. They are essentially the same as the requirements for a statement of merger in Section 205 [§ 30-18-205].

2. **Section 405(b)(3) and (f) [§ 30-18-405(2)(c) and (6)]**— The effective date and time of a statement of conversion are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of conversion is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 405(b)(3) [§ 30-18-405(2)(c)].

3. **Section 405(e) [§ 30-18-405(5)]** — A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in subsection (e) [(5)].

IDAHO REPORTER'S COMMENT

Section 30-18-405(4) Other than the few exceptions specified in this section, the public organic document of an entity must comply with all existing statutory and regulatory requirements. For example, Idaho requires identification of the statutory agent and governors for various entities.

30-18-406. Effect of conversion. — (1) When a conversion becomes effective:

(a) The converted entity is:

(i) Organized under and subject to the organic law of the converted entity; and

(ii) The same entity without interruption as the converting entity;

(b) All property of the converting entity continues to be vested in the converted entity without transfer, conveyance, assignment, reversion or impairment;

(c) All liabilities of the converting entity continue as liabilities of the converted entity;

(d) Except as provided by law other than this chapter or the plan of conversion, all of the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(e) The name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(f) If a converted entity is a filing entity, its public organic document is effective and is binding on its interest holders;

(g) If the converted entity is a limited liability partnership, its statement of qualification is effective simultaneously;

(h) The private organic rules of the converted entity that are to be in a record, if any, approved as part of the plan of conversion are effective and are binding on and enforceable by:

(i) Its interest holders; and

(ii) In the case of a converted entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the entity's private organic rules; and

(i) The interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion and to any appraisal rights they have under section 30-18-109, Idaho Code, and the converting entity's organic law.

(2) Except as otherwise provided in the organic law or organic rules of the converting entity, the conversion does not give rise to any rights that an

interest holder, governor, or third party would otherwise have upon a dissolution, liquidation, or winding-up of the converting entity.

(3) When a conversion becomes effective, a person that did not have interest holder liability with respect to the converting entity and that becomes subject to interest holder liability with respect to a domestic entity as a result of a conversion has interest holder liability only to the extent provided by the organic law of the entity and only for those liabilities that arise after the conversion becomes effective.

(4) When a conversion becomes effective:

(a) The conversion does not discharge any interest holder liability under the organic law of a domestic converting entity to the extent the interest holder liability arose before the conversion became effective;

(b) A person does not have interest holder liability under the organic law of a domestic converting entity for any liability that arises after the conversion becomes effective;

(c) The organic law of a domestic converting entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (a) of this subsection as if the conversion had not occurred; and

(d) A person has whatever rights of contribution from any other person as are provided by the organic law or organic rules of the domestic converting entity with respect to any interest holder liability preserved under paragraph (a) of this subsection as if the conversion had not occurred.

(5) When a conversion becomes effective, a foreign entity that is the converted entity:

(a) May be served with process in this state for the collection and enforcement of any of its liabilities; and

(b) Appoints the secretary of state as its agent for service of process for collecting or enforcing those liabilities.

(6) If the converting entity is a qualified foreign entity, the certificate of authority or other foreign qualification of the converting entity is canceled when the conversion becomes effective.

(7) A conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

History.

I.C., § 30-18-406, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 12, p. 83.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in paragraphs (1)(b) and (1)(c), inserted "converted"; deleted former paragraph (1)(f), which formerly read: "Unless otherwise provided by the organic law of the converting entity, the conversion does not cause the dissolution of the converting entity" and made related redesignations; in the introductory paragraph in paragraph (1)(h), added "and enforceable by"; added the paragraph (1)(h)(i) designation and paragraph (1)(h)(ii); in paragraph (1)(i), added "and the converting entity's organic law"; and added subsection (7).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — A converted entity is the same entity as it was before the conversion; it just has a different legal form. The legal effects of this are set forth in subsection (a) [(1)]. The converted entity remains the owner of all real and personal property and remains subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under Section 1001 of the Uniform Partnership Act (1997), a statement of partnership authority under Section 303 of the Uniform Partnership Act (1997) or a statement of authority under Section 5 of the Uniform Unincorporated Nonprofit Association Act.

2. **Section 406(a)(5) [§ 30-18-406(1)(e)]** — All pending proceedings involving the converting entity are continued. The name of the converted entity may be, but need not be, substituted in any pending proceeding for the name of the converting entity.

3. **Section 406(c) [§ 30-18-406(3)]** — Subsection (c) [(3)] provides the rule for future interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Comment 6 to Section 206 [§ 30-18-206].

4. **Section 406(d) [§ 30-18-406(4)]** — Subsection (d) [(4)] provides the rule for past interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Comment 7 to Section 206 [§ 30-18-206].

5. **Section 406(e) [§ 30-18-406(5)]** — When a domestic converting entity becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting entity. Section 406(d) [§ 30-6-406(4)], which parallels analogous provisions in Articles [Parts] 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state, and designates the Secretary of State of this state as the agent for service of process in the event the converted entity cannot be otherwise served in this state.

6. **Section 406(g) [§ 30-18-406(7)]** — When a conversion takes effect, the entity continues to exist — simply in a different form. Section 406(g) [§ 30-18-406(7)] thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Part 5. Domestication

30-18-501. Domestication authorized. — (1) Except as otherwise provided in this section, by complying with this part, a domestic entity may become a domestic entity of the same type in a foreign jurisdiction if the domestication is authorized by the law of the foreign jurisdiction.

(2) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may become a domestic entity of the same type in this state if the domestication is authorized by the law of the foreign entity's jurisdiction of organization.

(3) When the term "domestic entity" is used in this part with reference to a foreign jurisdiction, it means an entity whose internal affairs are governed by the law of the foreign jurisdiction.

(4) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a domestication, the provision applies to a domestication of the entity as if the domestication were a

merger until the provision is amended after the effective date of this chapter.

History.
I.C., § 30-18-501, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — A domestication authorized by Article [Part] 5 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts and liabilities, and actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title.

Article [Part] 5 governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this act. On the other hand, the organic laws of the foreign jurisdiction, and not Article [Part] 5, will govern the legal effect of a domestication of a domestic entity in another jurisdiction. In the latter scenario, Article [Part] 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Article [Part] 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, Section 501 [§ 30-18-501] does not provide a right on the part of a foreign entity to become a domestic entity if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication transaction, a domestication can still be accomplished by forming a new entity of the same type in the new state and merging the existing entity into the new entity.

2. **Section 501(d) [§ 30-18-501(4)]** — *See* Comment 4 to Section 301(d) [§ 30-18-301(4)].

3. **Section 501(e) [not adopted in Idaho]** — Subsection (e) [(5)] is an optional provision that may be used to exclude certain types of entities from engaging in domestication transactions. A provision that excludes certain types of entities from the act generally is set forth in Section 110 [§ 30-18-110].

30-18-502. Plan of domestication. — (1) A domestic entity may become a foreign entity in a domestication by approving a plan of domestication. The plan must be in a record and contain:

(a) The name and type of the domesticating entity;

(b) The name and jurisdiction of organization of the domesticated entity;

(c) The manner of converting the interests in the domesticating entity into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(d) The proposed public organic document of the domesticated entity if it is a filing entity;

(e) The full text of the private organic rules of the domesticated entity that are proposed to be in a record;

(f) The other terms and conditions of the domestication; and

(g) Any other provision required by the law of this state or the organic rules of the domesticating entity.

(2) A plan of domestication may contain any other provision not prohibited by law.

History.

I.C., § 30-18-502, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — This section sets forth the requirements for the plan of domestication, which must be approved by the domesticating entity in accordance with Section 503 [§ 30-18-503]. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 202 [§ 30-18-202]. Subsection (a) [(1)] lists the mandatory provisions that must be in the plan. Subsection (b) [(2)] authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 502(a)(3) [§ 30-18-502(1)(c)]** — Interest holders in the domesticating entity may receive interests or other securities of the domesticated entity or any other person, obligations, rights to acquire interests or other securities, cash, or other property. *See also* Comment 3 to Section 202 [§ 30-18-202].

3. **Filing the Plan of Domestication** — The plan of domestication, may, but need not, be filed instead of the statement of domestication (Section 505 [§ 30-18-505]) so long as it contains all of the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 505(e) [§ 30-18-505(5)].

30-18-503. Approval of plan of domestication. — (1) A plan of domestication is not effective unless it has been approved:

(a) By a domestic domesticating entity:

(i) In accordance with the requirements, if any, in its organic rules for approval of a domestication;

(ii) If its organic rules do not provide for approval of a domestication, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

1. In the case of an entity that is not a business corporation, a merger, as if the domestication were a merger; or

2. In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the domestication were that type of merger; or

(iii) If neither its organic law nor organic rules provide for approval of a domestication or a merger described in subparagraph (ii)2. of this paragraph, by all of the interest holders of the entity entitled to vote on or consent to any matter; and

(b) In a record, by each interest holder of a domestic domesticating entity that will have interest holder liability for liabilities that arise after the domestication becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(i) The organic rules of the entity in a record provide for the approval of a domestication or merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all of the interest holders; and

(ii) The interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

(2) A domestication of a foreign domesticating entity is not effective unless it is approved in accordance with the law of the foreign entity's jurisdiction of organization.

History.

I.C., § 30-18-503, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 13, p. 85.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 36, in paragraph (1)(a)(ii), added the paragraph (1)(a)(ii)1. designation, and therein, added "In the case of an entity that is not a business corporation"; added paragraph (1)(a)(ii)2.; in paragraph (1)(a)(iii), inserted "described in subparagraph (ii)2. of this paragraph"; in the introductory paragraph in paragraph (1)(b), added "unless, in the case of an entity that is not a business corporation or nonprofit corporation"; and added paragraphs (1)(b)(i) and (1)(b)(ii).

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 503(a) [§ 30-18-503(1)]** — As is the case with the other types of transactions authorized by this act, there are three possible ways to obtain approval (defined in Section 102(3) [§ 30-18-102(3)]) of a domestication by a domestic entity. The first is to determine if the organic rules (defined in Section 102(27) [§ 30-18-102(27)]) of the domesticating entity contain specific approval provisions for a domestication. If they exist, then those provisions apply to approval of the plan of domestication. Section 503(a)(1)(A) [(1)(a)(i)]. If there are no domestication approval provisions, then the approval process for a merger in either the entity's organic law (defined in Section 102(26) [§ 30-18-102(26)]) or organic rules will apply. Section 503(a)(1)(B) [(1)(a)(ii)]. If there are no specific domestication approval provisions in the entity's organic rules and no merger approval provisions in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders is required. Section 503(a)(1)(C) [(1)(a)(iii)].

In the case of a foreign entity that is domesticating in this state, the required approval is determined by the laws of the foreign entity's jurisdiction of organization. Section 503(b) [(2)].

If approval of a domestication occurs under subsection (a)(1)(B) [(1)(a)(ii)], the approval provisions for mergers that will apply will not include provisions on "short-form" mergers. A short-form merger involves a merger between a subsidiary and a parent that controls a large majority of the interests in the subsidiary (typically at least 80 or 90%). In those cases, the parent is permitted to merge with the subsidiary without the need for the governors or interest holders of the subsidiary to approve the merger. Because a domestication is a single-party transaction, short-form merger procedures are inapposite and it was not considered necessary to confirm that in the statutory text (unlike in the case of interest exchanges, which are two-party transactions — *see* Section 303(d) [§ 30-18-303(4)]).

2. **Section 503(a)(2) [§ 30-18-503(1)(b)]** — *See* Comment 2 to Section 203 [§ 30-18-203] for an explanation of this interest holder liability provision.

IDAHO REPORTER'S COMMENT

Section 30-18-503 The reader should review the Idaho comment to Section 30-18-103.

30-18-504. Amendment or abandonment of plan of domestication — Statement of abandonment. — (1) A plan of domestication of a domestic domesticating entity may be amended:

(a) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(b) By the governors or interest holders of the entity in the manner

provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to any amendment of the plan that will change:

(i) The amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing, to be received by any of the interest holders of the domesticating entity under the plan;

(ii) The public organic document or private organic rules of the domesticated entity that will be in effect immediately after the domestication becomes effective, except for changes that do not require approval of the interest holders of the domesticated entity under its organic law or organic rules; or

(iii) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(2) After a plan of domestication has been approved by a domestic domesticating entity and before a statement of domestication becomes effective, the plan may be abandoned:

(a) As provided in the plan; or

(b) Unless prohibited by the plan, in the same manner as the plan was approved.

(3) If a plan of domestication is abandoned after a statement of domestication has been filed with the secretary of state and before the filing becomes effective, a statement of abandonment, signed on behalf of the entity, must be filed with the secretary of state before the time the statement of domestication becomes effective. The statement of abandonment takes effect upon filing, and the domestication is abandoned and does not become effective. The statement of abandonment must contain:

(a) The name of the domesticating entity;

(b) The date on which the statement of domestication was filed; and

(c) A statement that the domestication has been abandoned in accordance with this section.

History.
I.C., § 30-18-504, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section parallels analogous provisions in Articles [Parts] 2 (mergers), 3 (interest exchanges), and 4 (conversions).

30-18-505. Statement of domestication — Effective date. — (1) A

statement of domestication must be signed on behalf of the domesticating entity and filed with the secretary of state.

(2) A statement of domestication must contain:

(a) The name, jurisdiction of organization, and type of the domesticating entity;

(b) The name and jurisdiction of organization of the domesticated entity;

(c) If the statement of domestication is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(d) If the domesticating entity is a domestic entity, a statement that the plan of domestication was approved in accordance with this part or, if the domesticating entity is a foreign entity, a statement that the domestication was approved in accordance with the law of its jurisdiction of organization;

(e) If the domesticated entity is a domestic filing entity, its public organic document, as an attachment;

(f) If the domesticated entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(g) If the domesticated entity is a foreign entity that is not a qualified foreign entity, a mailing address to which the secretary of state may send any process served on the secretary of state pursuant to section 30-18-506(5), Idaho Code.

(3) In addition to the requirements of subsection (2) of this section, a statement of domestication may contain any other provision not prohibited by law.

(4) If the domesticated entity is a domestic entity, its public organic document, if any, must satisfy the requirements of the law of this state, except that it does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic document.

(5) A plan of domestication that is signed on behalf of a domesticating domestic entity and meets all of the requirements of subsection (2) of this section may be filed with the secretary of state instead of a statement of domestication and upon filing has the same effect. If a plan of domestication is filed as provided in this subsection (5), references in this chapter to a statement of domestication refer to the plan of domestication filed under this subsection (5).

(6) A statement of domestication becomes effective upon the date and time of filing or the later date and time specified in the statement of domestication.

History.

I.C., § 30-18-505, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 14, p. 86.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Amendments.
The 2008 amendment, by ch. 36, added paragraph (2)(g).

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **In General** — The filing of a statement of domestication makes the transaction a matter of public record. The mandatory requirements for a statement of domestication are set forth in subsection (b) [(2)]. They are essentially the same as the requirements for a statement of merger in Section 205 [§ 30-18-205].

2. **Section 505(b)(3) and (e) [§ 30-18-505(2)(c) and (5)]** — The effective date and time of a statement of domestication are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of domestication is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 505(b)(3) [(2)(c)].

3. **Section 505(e) [§ 30-18-505(5)]** — A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in subsection (e) [(5)].

IDAHO REPORTER'S COMMENT

Section 30-18-505(4) Other than the few exceptions specified in this section, the public organic document of an entity must comply with all existing statutory and regulatory requirements. For example, Idaho requires identification of the statutory agent and governors for various entities.

30-18-506. Effect of domestication. — (1) When a domestication becomes effective:

(a) The domesticated entity is:

(i) Organized under and subject to the organic law of the domesticated entity; and

(ii) The same entity without interruption as the domesticating entity;

(b) All property of the domesticating entity continues to be vested in the entity without transfer, conveyance, assignment, reversion or impairment;

(c) All liabilities of the domesticating entity continue as liabilities of the entity;

(d) Except as provided by law other than this chapter or the plan of domestication, all of the rights, privileges, immunities, powers and purposes of the domesticating entity remain in the domesticated entity;

(e) The name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

(f) If the domesticated entity is a filing entity, its public organic document is effective and is binding on its interest holders;

(g) If the domesticated entity is a limited liability partnership, its statement of qualification is effective simultaneously;

(h) The private organic rules of the domesticated entity that are to be in a record, if any, approved as part of the plan of domestication are effective and are binding on and enforceable by:

(i) Its interest holders; and

(ii) In the case of a domesticated entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the domesticated entity's private organic rules; and

(i) The interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the interest holders of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any appraisal rights they have under section 30-18-109, Idaho Code, and the domesticating entity's organic law.

(2) Except as otherwise provided in the organic law or organic rules of the domesticating entity, the domestication does not give rise to any rights that an interest holder, governor, or third party would otherwise have upon a dissolution, liquidation, or winding-up of the domesticating entity.

(3) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating entity and that becomes subject to interest holder liability with respect to a domestic entity as a result of the domestication has interest holder liability only to the extent provided by the organic law of the entity and only for those liabilities that arise after the domestication becomes effective.

(4) When a domestication becomes effective:

(a) The domestication does not discharge any interest holder liability under the organic law of a domesticating domestic entity to the extent the interest holder liability arose before the domestication became effective;

(b) A person does not have interest holder liability under the organic law of a domestic domesticating entity for any liability that arises after the domestication becomes effective;

(c) The organic law of a domestic domesticating entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (a) of this subsection as if the domestication had not occurred; and

(d) A person has whatever rights of contribution from any other person as are provided by the organic law or organic rules of a domestic domesticating entity with respect to any interest holder liability preserved under paragraph (a) of this subsection as if the domestication had not occurred.

(5) When a domestication becomes effective, a foreign entity that is the domesticated entity:

(a) May be served with process in this state for the collection and enforcement of any of its liabilities; and

(b) Appoints the secretary of state as its agent for service of process for collecting or enforcing those liabilities.

(6) If the domesticating entity is a qualified foreign entity, the certificate of authority or other foreign qualification of the domesticating entity is canceled when the domestication becomes effective.

(7) A domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

History.
I.C., § 30-18-506, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 15, p. 87.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Amendments.
The 2008 amendment, by ch. 36, deleted paragraph (1)(f), which formerly read: "Unless otherwise provided by the organic law of the domesticating entity, the domestication does not cause the dissolution of the domesticating entity" and made related redesignations; in the introductory paragraph in paragraph (1)(h), added "and enforceable by"; added the paragraph (1)(h)(i) designation and paragraph (1)(h)(ii); in paragraph (1)(i), added "and the domesticating entity's organic law"; and added subsection (7).

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Section 506(a)(1) [§ 30-18-506(1)(a)]** — The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of organization.

2. **Section 506(a)(2) [§ 30-18-506(1)(b)]** — A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

3. **Section 506(a)(4) [§ 30-18-506(1)(d)]** — All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

4. **Section 506(a)(9) [§ 30-18-506(1)(i)]** — The interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and the interest holders of the domesticating entity are only entitled to those rights. Section 506(a)(9) [(1)(i)], on its face, allows certain owners in the domesticating entity to be entitled to a continuing equity interest in the domesticated entity whereas other owners in the domesticating entity may be cashed out as a result of the transaction.

5. **Section 506(c) [§ 30-18-506(3)]** — Subsection (c) [(3)] provides the rule for future interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Comment 6 to Section 206 [§ 30-18-206].

6. **Section 506(d) [§ 30-18-506(4)]** — Subsection (d) [(4)] provides the rule for past interest holder liability and parallels analogous provisions in Articles [Parts] 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Comment 7 to Section 206 [§ 30-18-206].

7. **Section 506(e) [§ 30-18-506(5)]** — When a domestic domesticating entity becomes a foreign entity as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating entity. Section 506(d) [(4)], which parallels analogous provisions in Articles [Parts] 2 (mergers) and 4 (conversions), authorizes service of process for all such claims in this state, and designates the Secretary of State of this state as the agent for service of process in the event the domesticated entity cannot be otherwise served in this state.

8. **Section 506(g) [§ 30-18-506(7)]** — When a domestication takes effect, the entity continues to exist — simply as a domestic entity under the laws of a different state. Section 506(g) [(7)] thus makes clear that the domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Part 6. (Reserved)

Part 7. Miscellaneous Provisions

30-18-701. Consistency of application. — In applying and construing this chapter, consideration must be given to the need to promote consistency of the law with respect to its subject matter among states that enact it.

History.
I.C., § 30-18-701, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Compiler's Notes.
This section is derived from section 601 of the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-18-702. Relation to electronic signatures in global and national commerce act. — This chapter modifies, limits and supersedes the federal electronic signatures in global and national commerce act, 15 U.S.C. section 7001, et seq., but does not modify, limit or supersede section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b).

History.
I.C., § 30-18-702, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 16, p. 88.

STATUTORY NOTES

Amendments.
The 2008 amendment, by ch. 36, made minor technical corrections in the style of the federal citations.

Compiler's Notes.
This section is derived from section 602 of the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

30-18-703. Requirements for filing of documents. — (1) To be entitled to filing by the secretary of state, a document must satisfy the following requirements and the requirements of any other provision of this chapter that adds to or varies these requirements:

(a) This chapter requires or permits filing the document in the office of the secretary of state.

(b) The document contains the information required by this chapter and may contain other information.

(c) The document is in a record.

(d) The document is in the English language, but the name of an entity need not be in English if written in English letters or Arabic or Roman numerals.

(e) The document is signed:

(i) By an officer of a domestic or foreign corporation;

(ii) By a person authorized by a domestic or foreign entity that is not a corporation; or

(iii) If the entity is in the hands of a receiver, trustee, or other court appointed fiduciary, by that fiduciary.

(f) The document must state the name and capacity of the person that signed it. The document may contain a corporate seal, attestation, acknowledgment, or verification.

(g) The document must be delivered to the office of the secretary of state for filing. Delivery may be made by electronic transmission if and to the extent permitted by the secretary of state. If a document is filed in typewritten or printed form and not transmitted electronically, the secretary of state may require one (1) exact or conformed copy to be delivered with the document.

(2) When a document is delivered to the office of the secretary of state for filing, the correct filing fee required to be paid therewith by this chapter or other law must be paid or provision for payment made in a manner permitted by the secretary of state.

History.

I.C., § 30-18-703, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from section A1-1 in Appendix 1 to the uniform act.

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Form of documents.**

A document may be filed in typewritten or printed form through physical delivery to the Secretary of State or by electronic transmission. Electronic transmission includes the evolving methods of electronic delivery, including facsimile transmissions, electronic transmissions between computers via modems and filings through delivery of magnetic tapes or computer diskettes, all as may be permitted by the Secretary of State. To be eligible for filing, a document must be typed or printed or electronically transmitted in a format that can be retrieved or reproduced in typewritten or printed form and in the English language (except to the limited extent permitted by subsection (a)(4) [(1)(d)]). The Secretary of State is not authorized to prescribe forms (except to the extent permitted by Section A1-2 [§ 30-18-704]) and as a result may not reject documents on the basis of form (*see* Section A1-6 [§ 30-18-708]) if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section.

2. **Signature.**

To be filed a document must be signed by the appropriate person. No specific officer is designated as the appropriate person to sign in the case of a corporation. Similarly, an unincorporated entity is given the authority to designate the person to sign on its behalf. *See* Section 102(35) [§ 30-18-102(35)] for a description of the manner in which a document may be "signed."

The requirement in some state statutes that documents must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with documents filed under organic laws. On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgements, verifications, or seals; subsection (a)(6) [(1)(f)] therefore provides that the addition of these forms of execution does not affect the eligibility of the document for filing.

3. **Contents.**

A document must be filed by the Secretary of State if it contains the information required by this act. The document may contain additional information or statements and their presence is not ground for the Secretary of State to reject the document for filing. These documents must be accepted for filing even though the Secretary of State believes that the language is illegal or unenforceable. In

view of this very limited discretion granted to Secretaries of State under this section, Section A1-6(d) [§ 30-18-708(4)] defines the Secretary of State's role as "ministerial" and provides that no inference or presumption arises from the fact that the Secretary of State accepted a document for filing. *See* the Comments to Sections A1-6 and A1-8 [§§ 30-18-708 and 30-18-710].

4. **Number of copies.**
The Secretary of State is permitted to require an exact or conformed copy if the document is being filed in typewritten or printed form, providing the secretary of state flexibility to determine whether or not such copies serve any purpose. There is no such requirement with respect to documents transmitted electronically. Under subsection (a)(7) [(1)(g)] an "exact" copy is a reproduction of the executed original document; a "conformed" copy is a copy on which the existence of signatures is entered or noted on the copy.

30-18-704. Forms. — The secretary of state may prescribe and furnish, on request, forms for documents required or permitted to be filed by this chapter but their use is not mandatory.

History.
I.C., § 30-18-704, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Compiler's Notes.
This section is derived from section A1-2 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

As described in the Comments to Section A1-1 [§ 30-18-703], documents are entitled to filing if they meet the substantive and formal requirements of this act; they may also contain additional information if the person submitting the document so elects. In these circumstances it is not appropriate to vest the Secretary of State with general authority to establish mandatory forms for use under the act. This section authorizes (but does not require) the Secretary of State to prepare forms suitable for filing under the act. However, the use of these forms is permissive and cannot be required by the Secretary of State.

30-18-705. Filing, service and copying fees. — (1) The secretary of state shall collect a fee of ten dollars ($10.00) each time process is served on the secretary of state under this chapter. The party to a proceeding causing service of process may recover this fee as costs if the party prevails in the proceeding.

(2) The secretary of state shall collect the following fees for copying and certifying the copy of any document filed under this chapter:

(a) Twenty-five cents (25¢) per page for copying; and

(b) Ten dollars ($10.00) for the certificate.

(3) The secretary of state shall collect the following fees when the documents described are delivered for filing:

(a) Statement of merger $30.00

(b) Statement of abandonment of merger $30.00

(c) Statement of interest exchange $30.00

(d) Statement of abandonment of interest exchange $30.00

(e) Statement of conversion $30.00

(f) Statement of abandonment of conversion $30.00
(g) Statement of domestication $30.00
(h) Statement of abandonment of domestication $30.00

History.
I.C., § 30-18-705, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-3 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section establishes the filing fees for all documents that may be filed under the act. The dollar amounts for each document should be inserted by each state as it adopts the act.

Subsection (b) [(2)] establishes standard fees for copying filed documents and certifying that the copies are true copies. The dollar amounts for these services should be conformed to the fees charged for similar services under other provisions of law.

The documents filed under this act are referred to as "statements" in order to differentiate them from filings under corporation laws, which are typically referred to as "articles," and from filings under partnership and other unincorporated entity laws, which are typically referred to as "certificates."

30-18-706. Effective time and date of document. — Except as provided in section 30-18-707, Idaho Code, a document accepted for filing is effective:

(1) At the date and time of filing, as evidenced by the means used by the secretary of state for recording the date and time of filing;

(2) At the time specified in the document as its effective time on the date it is filed;

(3) At a specified delayed effective time and date if permitted by this chapter; or

(4) If a delayed effective date but no time is specified, at the close of business on the date specified.

History.
I.C., § 30-18-706, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-4 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

Documents accepted for filing become effective at the date and time of filing, or at another specified time on that date, unless a delayed effective date is selected. This section gives express statutory authority to the common practice of most Secretaries of State of ignoring processing time and treating a document as effective as of the date it is submitted for filing even though it may not be reviewed and accepted for filing until several days later.

This section requires Secretaries of State to maintain some means of recording the date and time of filing of documents and provides that documents become effective at the recorded time on the date of filing. This provision should eliminate any doubt about situations involving same-day transactions in which a document, for example, a statement of merger, is filed on the morning of the date the merger is to become effective. This section contemplates that the time of filing, as well as the date, will be routinely recorded.

Paragraph (3) does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

30-18-707. Correcting filed document. — (1) A domestic or foreign entity may correct a document filed by the secretary of state if:

(a) The document contains an inaccuracy;

(b) The document was defectively signed; or

(c) The electronic transmission of the document to the secretary of state was defective.

(2) A document is corrected by filing with the secretary of state a statement of correction that:

(a) Describes the document to be corrected and states its filing date or has attached a copy of the document;

(b) Specifies the inaccuracy or defect to be corrected; and

(c) Corrects the inaccuracy or defect.

(3) A statement of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, a statement of correction is effective when filed.

History.

I.C., § 30-18-707, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from section A1-5 in Appendix 1 to the uniform act.

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section permits making corrections in filed documents without refiling the entire document. Under subsection (c) [(3)], the correction relates back to the original effective date of the document being corrected, except as to persons relying on the original document and adversely affected by the correction. As to these persons, the effective date of the statement of correction is the date the statement is filed.

A document may be corrected either because it contains an inaccuracy or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original document for filing). In addition, the document may be

corrected if its electronic transmission was defective. This is intended to cover the situation where an electronic filing is made but, due to a defect in transmission, the filed document is later discovered to be inconsistent with the document intended to be filed. If no filing is made because of a defect in transmission, a statement of correction may not be used to make a retroactive filing. Therefore, an entity making an electronic filing should take steps to confirm that the filing was received by the Secretary of State.

A provision in a document setting an effective date may be corrected under this section, but the corrected effective date must comply with the requirements of this act limiting delayed effective dates to within 90 days after filing. A corrected effective date is thus measured from the date of the original filing of the document being corrected, *i.e.*, it cannot be before the date of filing of the document or more than 90 day thereafter.

30-18-708. Filing duty of secretary of state. — (1) A document delivered to the office of the secretary of state for filing that satisfies the requirements of section 30-18-703, Idaho Code, must be filed by the secretary of state.

(2) The secretary of state files a document by recording it as filed on the date and time of receipt. After filing a document, the secretary of state shall deliver to the domestic or foreign entity or its representative a copy of the document with an acknowledgment of the date and time of filing.

(3) If the secretary of state refuses to file a document, the secretary of state shall return the document to the domestic or foreign entity or its representative within five (5) days after the document was delivered, together with a brief, written explanation of the reason for the refusal.

(4) The duty of the secretary of state to file documents under this section is ministerial. The filing or refusal to file a document does not:

(a) Affect the validity or invalidity of the document in whole or in part;

(b) Relate to the correctness or incorrectness of information contained in the document; or

(c) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

History.

I.C., § 30-18-708, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from section A1-6 in Appendix 1 to the uniform act.

Effective Dates.

Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **Filing duty in general.**

Under this section the Secretary of State is required to file a document if it "satisfies the requirements of Section A1-1 [§ 30-18-703]." The purpose of this language is to limit the discretion of the Secretary of State to a ministerial role in reviewing the contents of documents. If the document submitted is in the form prescribed and contains the information required by Section A1-1 [§ 30-18-703] and the applicable provision of this act, the Secretary of State must file it even though it contains additional provisions the Secretary of State may feel are irrelevant or not authorized by the act or by general legal principles. Consistently with this approach, subsection

(d) [(4)] states that the filing duty of the Secretary of State is ministerial and provides that filing a document with the Secretary of State does not affect the validity or invalidity of any provision contained in the document and does not create any presumption with respect to any provision. Persons adversely affected by provisions in a document may test their validity in a proceeding appropriate for that purpose. Similarly, the attorney general of the state may also question the validity of provisions of documents filed with the Secretary of State in an independent suit brought for that purpose; in neither case should any presumption or interference be drawn about the validity of the provision from the fact that the Secretary of State accepted the document for filing.

2. **Mechanics of filing.**

Subsection (b) [(2)] provides that when the Secretary of State files a document, the Secretary of State records it as filed on the date and time of receipt, retains the original document for the state's records, and delivers a copy of the document to the entity or its representative with an acknowledgement of the date and time of filing. In the case of a document transmitted electronically, delivery may be made by electronic transmission. The copy returned will be the exact or conformed copy if one has been required by the Secretary of State, or will be a copy made by the Secretary of State if an exact of conformed copy was not required. Of course, a person desiring a certified copy of any filed document may obtain it from the office of the Secretary of State by paying the fee prescribed in Section A1-3(b) [§ 30-018-705(2)].

3. **Elimination of certificates and similar documents.**

Subsection (b) [(2)] provides that acceptance of a filing is evidenced merely by the issuance of a fee receipt or acknowledgement of receipt if no fee is required. The act does not provide for the Secretary of State to issue a formal certificate of filing. A single document — the fee receipt or acknowledgement — should sufficiently indicate that the document has been accepted for filing.

4. **Rejection of document by Secretary of State.**

Because of the simplification of formal filing requirements and the limited discretion granted to the Secretary of State by this act, it is probable that rejection of documents for filing will occur only rarely. Subsection (c) [(3)] provides that if the Secretary of State does reject a document for filing, the Secretary of State must return it to the entity or its representative within five days together with a brief written explanation of the reason for rejection. In the case of a document transmitted electronically, rejection of the document may be made electronically by the Secretary of State or by a mailing to the entity. A rejection may be the basis of judicial review under Section A1-7 [§ 30-18-709].

30-18-709. Appeal from refusal to file a document. — (1) If the secretary of state refuses to file a document delivered for filing, the domestic or foreign entity that submitted the document for filing may appeal the refusal within thirty (30) days after the return of the document to the fourth judicial district court of Ada county. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the explanation of the secretary of state for the refusal to file. Notice of the petition shall be provided to the secretary of state.

(2) The court may summarily order the secretary of state to file the document or take other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

History.

I.C., § 30-18-709, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-7 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

1. **The court with jurisdiction to hear appeals from the Secretary of State.**
The identity of the specific court with jurisdiction to hear appeals from the Secretary of State under this section must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. It may either be the court located in the capital of the state or the court in the county where the entity's principal business office is located in the state or, if the entity does not have a principal office in the state, the court located in the county in which its registered office is located.

2. **"Summary" orders.**
In view of the limited discretion of the Secretary of State under the act, a "summary" order appears to be appropriate under this section. The word "summary" is not used in a technical sense but to refer to a class of cases where the court might appropriately order that action be taken on the face of the pleadings or after an oral hearing but without any need to resolve disputed factual issues.

3. **Burden of proof and review standard.**
The act does not address either the burden of proof or the standard for review in judicial proceedings challenging action of the Secretary of State. It is contemplated that these matters will be governed by general principles of judicial review of agency action in each adopting state.

30-18-710. Evidentiary effect of copy of filed document. — A certificate from the secretary of state, delivered with a copy of a document filed by the secretary of state, may be relied upon as prima facie evidence that the original document is on file with the secretary of state.

History.
I.C., § 30-18-710, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-8 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

The Secretary of State may be requested to certify that a specific document has been filed upon payment of the fees specified in Section A1-3(c) [§ 30-18-705(3)]. This section provides that the certificate is conclusive evidence only that the document is on file. The limited effect of the certificate is consistent with the ministerial filing obligation imposed on the Secretary of State under the act. The certificate from the Secretary of State, as well as the copy of the document, may be delivered by electronic transmission.

30-18-711. Penalty for signing false document. — A person commits a misdemeanor punishable by a fine of not to exceed five hundred dollars ($500) if the person signs a document the person knows is false in any

material respect with intent that the document be delivered to the secretary of state for filing.

History.
I.C., § 30-18-711, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-9 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section makes it a criminal offense for any person to sign a document that he knows is false in any material respect with intent that the document be submitted for filing to the secretary of state. As provided in Section 102(35) [§ 30-18-102(35)], "sign" includes any manual, facsimile, conformed or electronic signature.

This section is keyed to the classification of offenses provided by the Model Penal Code. If a state has not adopted this classification, the dollar amount of the fine should be substituted for the misdemeanor classification.

30-18-712. Powers of secretary of state. — The secretary of state has the power reasonably necessary to perform the duties required by this chapter.

History.
I.C., § 30-18-712, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Cross References.
Secretary of state, § 67-901 et seq.

Compiler's Notes.
This section is derived from section A1-10 in Appendix 1 to the uniform act.

Effective Dates.
Section 12 of S.L. 2007, ch. 116, provided that the act should take effect on and after July 1, 2007.

OFFICIAL COMMENT

This section is intended to grant the Secretary of State the authority necessary for the efficient performance of the filing and other duties imposed by the act, but is not intended to provide general authority to establish public policy. The most important aspects of modern organic laws relate to the creation and maintenance of relationships among persons interested in or involved with an entity; these relationships basically should be a matter of concern to the parties involved and not subject to regulation or interpretation by the Secretary of State.

30-18-713. Savings clause. — This chapter does not affect an action or proceeding commenced or right accrued before the effective date of this chapter.

History.
I.C., § 30-18-713, as added by 2007, ch. 116, § 1, p. 333.

STATUTORY NOTES

Compiler's Notes.
The phrase "the effective date of this chapter" refers to the effective date of S.L. 2007, ch. 116, which was July 1, 2007.

CHAPTER 19

SUCCESSOR CORPORATION ASBESTOS-RELATED LIABILITY FAIRNESS ACT

30-1901. Short title. — This act shall be known and may be cited as the "Successor Corporation Asbestos-Related Liability Fairness Act."

History.
I.C., § 30-1901, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.
The term "this act" refers to S.L. 2012, ch. 193, which is codified as §§ 30-1901 to 30-1907.

S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1902. Definitions. — As used in this section, the following terms shall mean:

(1) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution or other relief arising out of, based on, or in any way related to asbestos, including:

(a) The health effects of exposure to asbestos, including a claim for:

(i) Personal injury or death;

(ii) Mental or emotional injury;

(iii) Risk of disease or other injury; or

(iv) The costs of medical monitoring or surveillance;

(b) Any claim made by, or on behalf of, any person exposed to asbestos, or a representative, spouse, parent, child or other relative of the person; and

(c) Any claim for damage or loss caused by the installation, presence, or removal of asbestos.

(2) "Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state or a foreign corporation organized under laws other than the laws of this state.

(3) "Successor" means a corporation that assumes or incurs or has

assumed or incurred successor asbestos-related liabilities that is a successor and became a successor before January 1, 1972, or is any of that successor corporation's successors.

(4) "Successor asbestos-related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation with or into another corporation, or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined pursuant to section 30-1905, Idaho Code, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

(5) "Transferor" means a corporation from which the successor asbestos-related liabilities are or were assumed or incurred.

History.
I.C., § 30-1902, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.
S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1903. Applicability. — (1) The limitations in section 30-1904, Idaho Code, shall apply to any successor corporation.

(2) The limitations of section 30-1904, Idaho Code, shall not apply to:

(a) Worker's compensation benefits paid by, or on behalf of, an employer to an employee under the provisions of title 72, Idaho Code, or a comparable worker's compensation law of another jurisdiction;

(b) Any claim against a corporation that does not constitute a successor asbestos-related liability;

(c) Any obligation under the national labor relations act, 29 U.S.C. section 151 et seq., as amended, or under any collective bargaining agreement; or

(d) A successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products that were the same as those products previously manufactured, distributed, removed, or installed by the transferor.

History.
I.C., § 30-1903, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.
S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1904. Limitations on successor asbestos-related liabilities. — (1) Except as further limited in subsection (2) of this section, the cumulative successor asbestos-related liabilities of a successor corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The successor corporation does not have responsibility for successor asbestos-related liabilities in excess of this limitation.

(2) If the transferor has assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation with a prior transferor, then the fair market value of the total assets of the prior transferor determined as of the time of the earlier merger or consolidation shall be substituted for the limitation set forth in subsection (1) of this section for purposes of determining the limitation of liability of a successor corporation.

History.
I.C., § 30-1904, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.
S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1905. Establishing fair market value of total gross assets. — (1) A successor corporation may establish the fair market value of total gross assets for the purpose of the limitations under section 30-1904, Idaho Code, through any method reasonable under the circumstances, including:

(a) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arms-length transaction; or

(b) In the absence of other readily available information from which the fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(2) Total gross assets include intangible assets.

(3) To the extent total gross assets include any liability insurance that was issued to the transferor whose assets are being valued for purposes of this section, the applicability, terms, conditions and limits of such insurance shall not be affected by this statute, nor shall this statute otherwise affect the rights and obligations of an insurer, transferor or successor under any insurance contract and/or any related agreements, including, without

limitation, preenactment settlements resolving coverage-related disputes, and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods where insurance is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total gross assets include any such liability insurance, a settlement of a dispute concerning any such liability insurance coverage entered into by a transferor or successor with the insurers of the transferor before the effective date of this act shall be determinative of the total coverage of such liability insurance to be included in the calculation of the transferor's total gross assets.

History.
I.C., § 30-1905, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.
The phrase "the effective date of this act" near the end of subsection (3) refers to the effective date of S.L. 2012, ch. 193, which was July 1, 2012.

S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1906. Adjustment. — (1) Except as provided in subsections (2) through (4) of this section, the fair market value of total gross assets at the time of the merger or consolidation shall increase annually at a rate equal to the sum of:

(a) The prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, unless the prime rate is not published in that edition of the Wall Street Journal, in which case any reasonable determination of the prime rate on the first day of the year may be used; and

(b) One percent (1%).

(2) The rate enumerated in subsection (1) of this section shall not be compounded.

(3) The adjustment of the fair market value of total gross assets shall continue as provided in subsection (1) of this section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by, or on behalf of, the successor corporation or a predecessor or by, or on behalf of, a transferor after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(4) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance that may be included in the definition of total gross assets by subsection (3) of section 30-1905, Idaho Code.

History.
I.C., § 30-1906, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

S.L. 2012, Chapter 193 became law without the signature of the governor.

30-1907. Scope of chapter — Application. — (1) The courts of this state shall construe the provisions of this act liberally with regard to successors.

(2) This act shall apply to all asbestos claims filed against a successor on or after the effective date of this act and to any pending asbestos claims against a successor in which trial has not commenced as of the effective date of this act, except that any provisions of these sections which would be unconstitutional if applied retroactively shall be applied prospectively.

History.

I.C., § 30-1907, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, ch. 193, which is codified as §§ 30-1901 to 30-1907.

The phrase "the effective date of this act" refers to the effective date of S.L. 2012, ch. 193, which was July 1, 2012.

S.L. 2012, Chapter 193 became law without the signature of the governor.

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